87-1851

No. 87-.....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

DAVIS PACIFIC CORPORATION,
Petitioner,

VS.

VENTURA COUNTY FLOOD CONTROL DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

This case presents the following issues for review:

1. Whether the Fifth and Fourteenth Amendments entitle a private landowner to just compensation when massive flood damage results from the known and anticipated design failure of a public improvement.

2. Whether the Fifth and Fourteenth Amendments exonerate a public entity from constitutional condemnation liability based on financial inability.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Davis Pacific Corporation, petitioner, respectfully petitions for a writ of certiorari to review the decision of the California Supreme Court, In Bank, filed on April 6, 1988.

OPINIONS BELOW

The order of the California Supreme Court denying review, the opinions of the California Court of Appeal on hearing and rehearing, and the statement of decision of the trial court, are collectively set forth in the appendix filed with this petition.

JURISDICTION

The order of the California Supreme Court denying review was entered on April 6, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part, "[N]or shall private property be taken for public use, without just compensation." The Fifth Amendment applies to the States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 160, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980).

STATEMENT OF THE CASE

In this action, a man-made overhead levee was deliberately designed to fail at a pre-determined capacity. The public improvement failed as designed, resulting in catastrophic flood damage to plaintiff's property.

The California courts ruled that since the public entity could not afford to improve the facility, the public entity had no duty to pay just compensation when the public improvement failed as deliberately designed, constructed and maintained. The California courts also held that there can be no constitutional condemnation liability where the damage caused by the public improvement was not "deliberate."

A. The Calleguas Watershed

The Calleguas watershed is a 323 square mile area which includes the watershed areas of the Conejo, Santa Rosa and Simi Valleys in Ventura County, California. (C.T. 1645, 1646.) The Calleguas watershed includes the incorporated cities of Thousand Oaks, Simi Valley, Moorpark and portions of Camarillo. (*Id.*) The lower reaches of the Calleguas watershed cross farmlands on eastern portions of the Oxnard Plain in Ventura County. (*Id*).

Historically, flooding on the lower reaches of the Calleguas watershed, as well as the Santa Clara River watershed, resulted in alluvial deposits fanning across substantial portions of the Oxnard Plain. (R.T. 364, 2060-2061.) Beginning in the 1930s, farmers along the lower portions of the Calleguas watershed constructed levees to prevent downstream flooding and deposition on their properties. (R.T. 381.) By 1946, the farmers' levees were so effective on the lower Calleguas that flooding was virtually eliminated. (R.T. 386-387, 431.) In reliance on their comprehensive system of levees, the farmers made substantial private capital expenditures and increased cultivation to include winter crops. (R.T. 376, 384-386, 388, 392, 423-424.)

B. The Calleguas Creek Project

In 1961, the United States Soil Conservation Service, in conjunction with defendant Ventura County Flood Control District (hereinafter "VCFCD") and other local agencies, designed, engineered and constructed levees on the lower Calleguas where the farmers' levees had been in place. (R.T. 460, 1114A-1114F, 1124, 1236) The majority of the original farmers' levees were reduced in height by the project. (R.T. 278 [defense admission]; 1114B-1114E, 1199, 2264-2265.)

Because of recurrent alluvial deposition, the floor of the flood channel was to be maintained by VCFCD high above the neighboring agricultural lands, resulting in a man-made overhead levee. (C.T. 1645-1646; plaintiff's exhibit 74.) The primary structural benefit of the consolidated levee project was purportedly the placement of protective rock lining ("riprap") along the interior face of the levee. (R.T. 631.)

By contract between VCFCD and the United States Soil Conservation Service, VCFCD agreed at the time of construction to fully maintain the Calleguas project and to obtain easements from local landowners for such maintenance. (R.T. 456-457, 464, 1986-1987, 2005 2425; defendant's exhibits 42-44.)

C. Increasing Flow Due to Upstream Development

At the time of design of the Calleguas project, the total population of the Simi, Conejo and Santa Rosa Valleys, and that portion of Camarillo which drains into the Calleguas watershed, was approximately 14,500. (C.T. 1649, 1655, 1910 [offer of proof].) By February 1980, the upstream population had increased to approximately 218,000 people. (*Id.*)

Upstream development has significant impact upon the volume of flow into Calleguas Creek. (C.T. 1906-1914 [offer of proof].) VCFCD was intimately aware of the increased flow in Calleguas Creek both in terms of volume and velocity. (*Id.*; R.T. 2808.)

The Calleguas project was originally designed to carry 15,000 cubic feet of water per second ("cfs") plus an additional three feet of "freeboard." (R.T. 1200; 1456-1457.) Under its 15,000 cfs capacity, the Calleguas public improvement was originally *designed to fail every 50 years.* (R.T. 1239-1240.) The purpose of the three foot "freeboard" was to provide some additional capacity above and beyond the design capacity. (R.T. 883, 886, 887, 1205, 1237-1238, 1324.)

On February 25, 1969, VCFCD measured the flow on the lower Calleguas at 16,300 cfs. (R.T. 478, 1397.) On March 4, 1978, VCFCD measured the flow in Calleguas Creek at 18,700 cfs. (R.T. 478, 791, 1397.) With the

knowledge and approval of VCFCD, substantial upstream development continued. (C.T. 1906-1914 [offer of proof].)

D. The Discrepancy in Levee Height

On May 23, 1979, Jay Chatterly, an engineer at VCFCD, discovered that the west levee of Calleguas Creek was being maintained at least two feet below design specifications. (R.T. 744, 761-765.) When Mr. Chatterly reported this fact to his superiors at VCFCD, they were "unconcerned" and dismissed Mr. Chatterly's calculations as "baloney." (R.T. 496, 507, 510, 567-568, 765, 767, 769, 772, 830, 859, 881, 980-982, 2205.) It is now undisputed by VCFCD that Mr. Chatterly's calculations were in fact correct. (R.T. 513-514, 518-519, 569, 570, 1039-1040, 1132, 1387, 1401, 1408, 1772, 1843, 2205.) By the end of 1979, with a levee height at least two feet below design specifications, and the water level continually increasing as a result of upstream development, the stage was set for disaster.

E. Breakout

On the evening of February 16, 1980, at a flow of 25,190 cfs (R.T. 1400-1401), Calleguas Creek broke the levee at station 148, directing the flow of Calleguas Creek directly over the agricultural property of plaintiff Davis Pacific Corporation (hereinafter "Davis Pacific"). (R.T. 316-317, 1902.) Since the Calleguas channel bottom was maintained by VCFCD at an elevation eight feet above the surrounding farmlands (C.T. 1645-1646; plaintiff's exhibit 74), the entire flow from the Calleguas watershed emptied through the break and down onto the Davis Pacific property. (R.T. 316-317, 1902.)

Once the water had drained, thousands of tons of sand, mud, silt and debris covered 100 acres of Davis Pacific

property, destroying existing crops and equipment, and severely injuring the nature and quality of the agricultural soil. (R.T. 338, 340, 1522, 1524, 1528, 1529, 1530, 1545, 1549, 1643, 1644, 1669, 1829-1831, 1867, 1968, 1869, 1889, 1898, 1901-1902, 1914.) Total damage to the Davis Pacific property and farming operations was calculated at $1,844,691.98. (R.T. 1475, 1478, 1601, 1630, 1660, 1686, 1693-1694, 1700, 1721, 1903, 1908-1907, 1909; plaintiff's exhibits 117-121, 124, 128, 130-133, 135-144, 152, 156-157, 160, 162.)

F. Procedural Summary

On September 4, 1980, Davis Pacific and its subsidiary, Pacific Sod Farms, filed a California state court action against VCFCD and the State of California on various grounds, including denial of just compensation for the taking of Davis Pacific's property in violation of the United States and California constitutions. (C.T. 11.) On January 1, 1983, Pacific Sod Farms merged into Davis Pacific. (C.T. 1644.) The State of California was dismissed as a defendant (C.T. 1895), and the matter proceeded to jury trial in the Ventura County (California) Superior Court. (C.T. 1625; R.T. 1.)

G. The Trial

At the outset of the trial, the trial court refused to allow Davis Pacific the right to present any evidence of either the increased anticipated flow of Calleguas Creek or VCFCD's knowledge of that anticipated flow. (C.T. 1854-1872, 1906-1929; R.T. 7, 63-101, 162-199.) Davis Pacific was not allowed to mention upstream development or any cities in the Calleguas watershed. (R.T. 201-203.) A petition for writ of mandate was filed with the appellate court on this issue and was summarily denied. (See California Court of Appeal, 2nd Civil No. B004419.)

In addition, the trial court allowed VCFCD to present evidence and ultimately jury instructions that all of Davis Pacific's damages from the flood could be "offset" by alleged "benefits conferred" over the years by VCFCD's flood control improvements. (R.T. 1932-1940, 2340-2341, 2838; C.T. 1989-2004, 2119-2130, 2193; AOB 31-37; ARB 22-24.)

At the conclusion of the evidence, the trial court instructed the jury on statutory maintenance of a dangerous condition, but only after excluding evidence of the dangerous condition and providing VCFCD with a non-applicable discretionary immunity defense. (C.T. 2037; AOB 29-31; ARB 24-27.)

On April 20, 1984, the trial court ruled in favor of VCFCD on the liability phase of inverse condemnation, premising its ruling upon inapplicable governmental tort liability defenses and various assertions of the public interest. (R.T. 2807-2823.) The jury later returned a verdict in favor of VCFCD on the remaining causes of action. (C.T. 2296-2297.)

H. The New Trial Motion

On May 18, 1984, Davis Pacific moved for a new trial. On May 30, 1984, the trial court signed a Statement of Decision, finding no inverse condemnation liability upon facts which established constitutional condemnation liability as a matter of law. (C.T. 2370-2374; see *infra.*) On June 12, 1984, Davis Pacific's new trial motion was denied. (C.T. 2432; augmented transcript R.T. 1-16.) A timely appeal followed. (C.T. 2436.)

I. The Original Appellate Decision

On September 15, 1987, the California Court of Appeal issued its initial decision. The appellate court determined

that the erroneous "offset" and discretionary immunity instructions constituted prejudicial error, resulting in a miscarriage of justice, and remanded the dangerous condition and breach of contract issues for retrial. (Orig. Opin., at 15-25.) The appellate court affirmed the judgment for VCFCD on inverse condemnation and nuisance liability. (Orig. Opin., at 2, 25-35.)

J. The Appellate Decision on Rehearing

Both Davis Pacific and VCFCD filed petitions for rehearing. On January 12, 1988, the Court of Appeal issued its opinion on rehearing. This time, the Court of Appeal determined that VCFCD had no duty whatsoever in either tort, nuisance or breach of contract, thereby mooting any erroneous and prejudicial instructions. (Opin., at 1-17.) The Court of Appeal again affirmed VCFCD's judgment in inverse condemnation, holding that VCFCD could not afford to pay just compensation. (Opin., at 17-26.)

K. The Petition for Review

On April 6, 1988, the California Supreme Court summarily denied David Pacific's petition for review.

STAGE OF PROCEEDINGS CONSTITUTIONAL ISSUES RAISED

The constitutional condemnation issues were raised in Davis Pacific's initial verified complaint (C.T. 9), and asserted at length at the time of trial. (C.T. 1689-1699.) The trial court ruled in favor of the public entity, premising its ruling upon various statutory governmental tort liability defenses and various assertions of the public interest. (R.T. 2807-2823; C.T. 2370-2375.) The constitutional condemnation issues were raised before the Court

of Appeal at length (Appellant's Opening Brief 39-46; Appellant's Reply Brief at 2-7; Appellant's Petition for Rehearing at 1-7.) The California Court of Appeal determined that the public entity " . . . did not have the financial capability" to subject it to liability in inverse condemnation. (Opin., at 22.) The federal constitutional issues were again raised before the California Supreme Court (Petition for Review, at pp. 10-26), and summarily denied. (See Order Denying Review entered April 6, 1988.)

REASONS FOR GRANTING THE PETITION

This case presents important constitutional questions under Rule 17 concerning actual physical takings of private property by governmental entities without payment of just compensation as required under the Fifth and Fourteenth Amendments. Here, California courts have held that there is no constitutional duty to pay just compensation when the public entity allegedly cannot afford to modify its public improvements.

Though this Court has determined a number of recent cases involving regulatory "takings," public entities have lost sight of the fact that a constitutional duty to pay just compensation still exists for direct physical takings of private property. It was 76 years ago that Justice Holmes stated in *Pennsylvania Coal Co. v. Mahan,* 260 U.S. 393, 416, 67 L.Ed. 322, 43 S.Ct. 158:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Here, where the California courts attempt to forge a new "financial ability" exception to the Fifth Amendment,

intervention in the form of review is both essential and appropriate.

1. The design of the Fifth Amendment's just compensation provision is "... to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *First Lutheran Church v. Los Angeles County,* 482 U.S. ____, 96 L.Ed.2d 250, 266, 107 S.Ct. 2378 (1987); *Armstrong v. United States,* 364 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S.Ct. 1563 (1960). Where, as here, one person is asked to assume more than his fair share of the public burden, the payment of just compensation operates to redistribute that economic loss from the individual to the public at large. See *United States v. Willow River Co.,* 324 U.S. 499, 502, 89 L.Ed. 1101, 65 S.Ct. 761 (1945); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325, 37 L.Ed. 463, 13 S.Ct. 622 (1893).

The Calleguas Creek levee was designed to fail once every 50 years. (R.T. 1239-1240.) On February 16, 1980, at a flow in excess of the projected 50-year design flow, the Calleguas Creek levee smashed open at the Davis Pacific property (*Id.,* C.T. 2372), resulting in catastrophic flood damage to Davis Pacific's agricultural land and operations. (Opin., at 5.)

VCFCD has acknowledged its exclusive responsibility for maintenance of the Calleguas flood control channel. (R.B. 2-3; defendant's exhibits 42-44.) According to VCFCD and the trial court, the Calleguas channel was deliberately designed and constructed to withstand a flow of up to 15,000 cubic feet per second, plus a "safety factor." (R.B. 3, 8; C.T. 2372.) Again, according to VCFCD and the trial court, at 25,190 cfs, the undermining of the project's protective rock "riprap" caused the overhead levee to collapse at Davis Pacific's property.

(R.B. 7-8; C.T. 2372.) In other words, according to VCFCD and the trial court, Davis Pacific's injury resulted from the failure of a public improvement deliberately designed, constructed and maintained to fail at 25,190 cfs. (R.B. 1-8; C.T. 2372.)

The cost-spreading rationale of the Fifth Amendment was analyzed at length in Van Alstyne, *Inverse Condemnation: Unintended Physical Damage,* 20 Hastings L.J. 431, 437, in the context of anticipated and foreseeable flood damage from an artificial public improvement:

> "If [the flood control project] proves to be of insufficient capacity during normally foreseeable storms, inverse liability attains because the flooding, as a foreseeable consequence of the project, was proximately caused by the inherently defective design of the [project]."

In *Lea Company v. North Carolina Board of Transportation,* 308 N.C. 603, 304 S.E.2d 164 (1963), the North Carolina Supreme Court determined that a 100-year storm was reasonably foreseeable, and an appropriate basis for inverse condemnation liability. Here, VCFCD's anticipated 50-year storm was not only reasonably foreseeable, as indicated below, the anticipated 50-year storm now occurs every three to four years.

The design flow of the Calleguas Creek facility was exceeded in both 1969 and 1978. (R.T. 478, 491, 1397.) The design flow was exceeded in 1980 (C.T. 2372) and again in 1983.[1] With four anticipated excess flows in a span of 15 years, the original 50-year facility has in fact become a four-year facility. With continued upstream

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[1]The Calleguas Creek levee again breached in 1983, at a flow of 26,100 cfs, resulting in further damage to Davis Pacific. (See Ventura County Superior Court action number 82110.)

development, the public improvement will soon become a one-year or two-year facility.

Since there is no constitutional obligation for the public entity to upgrade the overhead levee, and since the exclusive maintenance contracts preclude self-help by Davis Pacific, *it is becoming abundantly clear that Davis Pacific's once-fertile agricultural lands have been condemned as permanent floodlands for the benefit of the upstream public, and a permanent public dumping ground for the entire Calleguas watershed.*

Calleguas Creek is an elevated man-made watercourse for purposes of channeling alluvial floodwaters from upper Calleguas watershed directly into the Pacific Ocean. (C.T. 1645-1646; plaintiff's exhibit 74.) In this case, VCFCD exclusively improved and maintained an elevated man-made channel at a given capacity designed to fail once every 50 years (R.T. 1239-1240). As a result of that designed failure, the nature and quality of Davis Pacific's agricultural soil has been destroyed. (R.T. 1545-1549, 1642-1645, 1830-1831, 1866-1869, 1902-1914.) This Court has for nearly a century required payment of just compensation whenever governmental construction begins to change the nature of land to make it unsuitable for agriculture. See, *e.g. United States v. Williams,* 188 U.S. 485, 47 L.Ed. 554, 23 S.Ct. 363 (1903); *United States v. Lynah,* 188 U.S. 445, 47 L.Ed. 539, 23 S.Ct. 349 (1903).

VCFCD had significant participation in the design and specifications of the Calleguas channel, including calculation of design flow. (R.T. 1124, 1236, 460.) Beginning in 1961, the Calleguas project was accepted and exclusively maintained by VCFCD. (R.B. 2-3; defendant's exhibits 42-44.) Though its valuable agricultural assets were on the line, Davis Pacific had no right to interfere with VCFCD's exclusive maintenance of the public Calleguas

Creek flood control channel. (Defendant's exhibits 42-44.) VCFCD deliberately maintained the Calleguas Creek project under a plan deliberately designed to fail. (R.T. 1239-1240.) The California courts nevertheless require Davis Pacific, on behalf of the entire Calleguas watershed, to absorb all losses resulting from the deliberate failure of the public improvement. (Opin., at 17-26.) The California courts' refusal to allow Davis Pacific its just compensation is in direct violation of the Fifth and Fourteenth Amendments.

2. In *McMahan's of Santa Monica v. City of Santa Monica,* 146 Cal.App.3d 683-698, 194 Cal.Rptr. 582 (1983), defendant city installed a water main with a 40-year life expectancy in 1924. In 1975, after vandals opened a number of fire hydrants, the water main broke and damaged plaintiff's property. A substantial cause of the break was found to be deep corrosion of the pipe. Under those facts, the trial court found for plaintiff on the liability phase of inverse condemnation. (146 Cal.App.3d at 688.) The appellate court in *McMahan's* discuss in detail the rationale for inverse condemnation liability, quoting at length from Van Alstyne, *supra*:

> "The fundamental justification for inverse condemnation liability is that the public entity, acting in furtherance of public objectives, is taking a calculated risk that damage to private property may occur . . . '[P]ractically every governmental decision to construct a public improvement involves, however remotely, at least some unforeseeable risks that physical damage to property may result. In the presumably rare instance where substantial damage does in fact eventuate directly from the project, and is capable of more equitable absorption by the beneficiaries of the project (ordinarily either taxpayers or

> consumers of service paid for by fees or charges) than by the injured owner, absence of fault may be treated as simply an insufficient justification for the shifting of the unforseeable loss from the project that it caused to be [sic] the equally innocent owners . . .' [E]ven with foreseeable damages, a balancing process occurs relating to the practicability of preventive measures and the costs of such prevention . . . . '*[T]he governmental decision to proceed with the project without incorporating the essential precautionary modifications in the plan thus represents more than a mere determination that effective damage prevention is not expedient.* It is also a deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large. *In effect, that decision treats private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project. If and when they materialize, however,* the present analysis suggests that *those costs should be recognized as planned costs inflicted in the interest of fulfilling the public purpose of the project and thus subject to a duty to pay just compensation.*' " (Emphasis added.) (146 Cal.App.3d 697.)

In *McMahan's,* inverse condemnation liability existed because the City deliberately deferred replacement of water pipes which had exceeded their useful life of 40 years. (146 Cal.App.3d at 687-688.)

In the instant action, the pre-existing farmers' levees had been effective for many years in preventing flood damage on the Davis Pacific property. (R.T. 386-387; 431.) When VCFCD unequivocally accepted the Calleguas project for operation and maintenance (defen-

dant's exhibits 42-44), it was accepted pursuant to a design that was expected to fail. (R.T. 1239-1240.)

VCFCD's decision to operate and maintain the Calleguas project without incorporating greater protection against flooding represents ". . . . a deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large." *McMahan's of Santa Monica v. City of Santa Monica, supra,* 146 Cal.App.3d at 697. By deliberately accepting a public improvement which by design was expected to fail once every 50 years, the public entity deferred such failure ". . . . as planned costs inflicted in the interest of fulfilling the public purpose of the project and thus subject to a duty to pay just compensation." (*Id.*)

It was no secret to VCFCD that its public improvement had become inadequate to handle anticipated flow. (C.T. 1906-1914 [offer of proof]; R.T. 2808.) There had already been two flows measured in excess of the anticipated 50-year flow since 1969. (R.T. 478, 491, 1397.)

In the instant action, VCFCD was successful in deferring the anticipated risk of damage on the Calleguas project from its acceptance in 1961 until the February 16, 1980, breakout. As determined by the trial court, the 1980 flooding was caused by the undermining of a public improvement deliberately designed, constructed and maintained to fail at a flow of 25,190 cfs. (C.T. 2372.) Under the principles of inverse condemnation, VCFCD must now pay the costs of a deliberate risk it had successfully deferred for 19 years, and through litigation has now deferred for 27 years.

3. The California courts attempt to side-step the public entity's constitutional duty by holding that a public entity is immune from the Fifth Amendment where just compensation is too expensive. (Opin., at 22.) The California courts' new "financial exception" to the constitutional requirement of just compensation permits a public entity to informally condemn private property without compensation, so long as the entity can claim the fiscal inadvisability of direct condemnation. The California courts' new exception to the Fifth Amendment — no duty to pay just compensation where condemnation is not affordable — is in direct violation of the Fifth and Fourteenth Amendments.

CONCLUSION

Davis Pacific is entitled as a matter of constitutional law to just compensation for the temporary and permanent taking of its land. To date, Davis Pacific has been afforded no remedy whatsoever by any court, and has now been told by the California courts that there is no remedy as a matter of law.

Davis Pacific respectfully requests that its petition for writ of certiorari be granted.

DATED: May 5, 1988

Respectfully submitted,

NORDMAN, CORMANY, HAIR
& COMPTON

By: GLEN M. REISER
Attorneys for Petitioner
Davis Pacific Corporation

APPENDIX A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 6, No. B006764
S004235

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

IN BANK

DAVIS PACIFIC CORP.

v.

VENTURA COUNTY FLOOD CONTROL DISTRICT

SUPREME COURT
FILED: APR 6 1988
Laurence P. Gill, Clerk

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAVIS PACIFIC CORPORATION
Plaintiff and Appellant,

v.

VENTURA COUNTY FLOOD CONTROL DISTRICT,
Defendant and Respondent.

2nd Civil No. B006764
(Super. Ct. No. 71923)
(Ventura County)

OPINION ON REHEARING

FILED: JAN 12 1988
Robert N. Wilson, Clerk

Davis Pacific Corporation (Davis Pacific) appeals from a judgment in favor of Ventura County Flood Control District (District) on causes of action for inverse condemnation, dangerous condition of public property, nuisance and breach of contract. Davis Pacific asserts a panoply of errors as prejudicial, including (1) exclusion of relevant evidence; (2) instructural errors and (3) entitlement to judgment in inverse condemnation, as a matter of law.

In its reply brief, Davis Pacific acknowledges that a review of Government Code section 840 in conjunction with this court's opinion in *Longfellow* v. *County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383 "leads to the inescapable conclusion that a . . . negligent maintenance

claim under the Tort Claims Act must necessarily be presented in the context of dangerous condition liability." (Gov. Code, §§ 835-835.4.) Consequently, we need not discuss claimed errors in failing to provide Davis Pacific with a separate and independent theory of negligence or any error affecting the cause of action for nuisance. (See *Longfellow* v. *County of San Luis Obispo, supra,* 144 Cal.App.3d 379, 383.)

Appellant, on rehearing, attempts to resuscitate the cause of action for nuisance by pointing out another appellate court's criticism of *Longfellow's* conclusion that pleading a defective or dangerous condition of public property as a nuisance is not an allegation of nuisance under Civil Code section 3479. (See *Pfleger* v. *Superior Court* (1985) 172 Cal.App.3d 421.) discussion of *Pfleger's* dissection of *Longfellow* is unnecessary since other reasons set forth *infra* scuttle appellant's claim of nuisance, as well as the causes of action for dangerous condition and breach of contract. We affirm the judgment.

FACTS

Davis Pacific's cause of action is based upon damage to its agricultural land, crops and improvements when the Calleguas Creek channel breached in February 1980. The Calleguas watershed is a 323 square-mile area which includes incorporated cities of Thousand Oaks, Simi Valley, Moorpark and parts of Camarillo. Lower reaches of the watershed cross farmlands in the eastern part of the Oxnard Plain in Ventura County. Historically, this area is subject to flooding, resulting in alluvial deposits fanning across portions of the Oxnard Plain.

In the 1930's, farmers in the lower Calleguas watershed constructed sand levees to protect their property from flooding to allow farming. As these levees did not elimi-

nate flooding, the Federal Soil Conservation Service (SCS) in 1961, in conjunction with District, the Simi Valley Conservation District and Calleguas Conservation District, designed and constructed levees on the lower Calleguas in place of the farmers' levees. Although District's employees were consulted during the designing of the project, by contract with the SCS, District agreed only to maintain the completed Calleguas project and to obtain easements from local landowners. The agreements negotiated with landowners in exchange for the easements recited that District's duties were to construct and maintain a flood control channel. SCS, responsible under its agreement with District for the design, construction and inspection of the project, hired an engineering firm to carry out the project's design and construction. Generally, the project involved cutting some areas of the old farmers' levees, filling others, adding rock rip-rap on the inside of the channel to a depth of three feet below the bottom of the channel (due to liquidity of the sandy bottom at high flows), and clearing the extensive bottom vegetation.

The project was designed to carry 15,000 cubic feet of water per second (cfs) plus a safety factor, and, as designed, substantially concentrated water flow compared to previous water dispersion from the farmers' levees. In February 1969 District measured the flow in the lower Calleguas at 16,300 cfs, and in March 1978 at 18,700 cfs. May 23, 1979, one of District's engineers, while measuring the west levee of the Calleguas Creek, discovered that it was two feet below design specifications.

February 16, 1980, while at a flow of 25,190 cfs, Calleguas Creek broke the levee at Station 148, causing flooding, deposition of thousands of tons of sand and debris over 100 acres of Davis Pacific's property, destruc-

tion of crops and equipment, and injury to the quality of the soil. Davis Pacific claimed total damage of $1,844,691.98.

At trial, Davis Pacific's theory was that the breach in the levee was due to "overtopping" caused by failure to maintain the levee at its design level. District's theory was that the levee had not been built to specification but that District had properly maintained the project as constructed. Additionally, District theorized that the levee broke due to undermining, not through any fault of District, but because the flow greatly exceeded design capacity.

District moved *in limine* to exclude any evidence of upstream development and to prevent presentation of evidence that District was aware of increased flow due to upstream development. District contended that this evidence created an inference that District had a duty to upgrade the capacity of the channel or improve the design rather than simply maintain the project. The court agreed that the evidence implied a duty the court did not find District had and that presentation of the evidence would be unduly time-consuming. The court granted the motion pursuant to Evidence Code section 352. The trial court did allow Davis Pacific to introduce evidence that District had measured levels above design capacity on two occasions.

The trial court allowed District to present evidence, and instructed the jury, that Davis Pacific's damages from the flood could be offset by benefits conferred by the project as built by SCS. District's expert calculated these benefits to be $1,878,000. The trial court, ruling on the issue of liability on the inverse condemnation theory, found in favor of District and the jury returned a general verdict in District's favor on the remaining theories of

dangerous condition, nuisance, and breach of contract. Davis Pacific's motion for new trial was denied.

DISCUSSION

1. *Evidence of Upstream Development.*

In the hearing on District's motion to exclude evidence of upstream development, Davis Pacific contended that in determining District's responsibility to maintain the levees as designed and constructed as it related to their knowledge of a dangerous condition, the jury and the trial court should have the benefit of knowing what the District knew that upstream development was causing an increase in the flow of the channel. This evidence was relevant, David Pacific contended, to the reasonableness of District's actions. Davis Pacific also argued this evidence was relevant to whether District had an obligation to redesign or upgrade the project as conditions changed — an argument they now eschew. The given facts were: (1) the channel was designed to contain a 50-year flood flow of 15,000 cfs; (2) the channel failed at 25,190 cfs; and (3) District was obliged to maintain the levee to the height as built by SCS when District accepted it in February 1961. The crucial questions were the condition and height of the levee when conveyed to District, the cause of the levee's failure, and the possibility of District's negligence in maintaining it. There were two separate fact finders — the trial court as to inverse condemnation and the jury as to the remaining causes of action.

The trial court held that presentation of evidence of District's knowledge of increased flow was "contrary to existing law" and would place an undue financial burden on District. Davis Pacific requested that minimally it be

allowed to cross-examine District's witnesses on their knowledge of anticipated flow and that the court give a limiting instruction to the jury that District had no duty to build a bigger channel. The court refused the request because it believed the implication would still remain that District had a duty to improve the project if it had knowledge of increased flow due to upstream development. The trial court ruled that District had no duty to handle additional runoff resulting from extensive upstream development.

District contends that upstream development is irrelevant to any negligence on its part in maintaining a dangerous condition since its only duty was to maintain the facility as built by SCS and to not make matters worse. (*Tri-Chem, Inc.* v. *Los Angeles County Flood Control Dist.* (1976) 60 Cal.App.3d 306, 312.) It asserts that it had no mandatory direction under the statutes that created it (Wat. Code App., 46-1 et seq.) to build public improvements of any particular design or, in fact, to build any improvements at all. (*Stone* v. *L. A. County Flood Control Dist.* (1947) 81 Cal.App.2d 902, 912.)

District further argues that to hold otherwise would create duties on the part of a flood control district which it could not afford to carry out, that it has no power to increase the capacity of the channel, nor does it have the funds, since specific enabling legislation provides specific funding limitations. (See Wat. Code App., §§ 46-12, 46-12.2.) Additionally, imposing this burden would give little, if any, incentive for a public entity to extend its aid at all. (See *Janssen* v. *County of Los Angeles* (1942) 50 Cal.App.2d 45, 56-57.)

The trial court has discretion to exclude evidence if it determines that the probative value is substantially outweighed by the probability that its admission will either

necessitate undue consumption of time or create substantial danger of undue prejudice. (Evid Code, § 352.) Its decision will not be reversed on appeal unless there is a manifest abuse of discretion resulting in a miscarriage of justice. (See *Baker* v. *Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 338-339; Cal. Const., art. VI, § 13.) No evidence is admissible except relevant evidence. (Evid. Code, § 350.)

To prove a dangerous condition of public property, a plaintiff must establish that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which occurred, and that either: (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. (Gov. Code, § 835.)

A public entity has actual notice of a dangerous condition within the meaning of subdivision (b) if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. (§ 835.2, subd. (a).) A public entity has constructive notice within the meaning of subdivision (b) only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in exercise of due care, should have discovered the condition and its dangerous character. (§ 835.2, subd. (b).)

Knowledge of upstream development was probative on the issue of notice to District that, because of increased

flow, the channel and levees built by SCS were inadequate and thus constituted a dangerous condition. However, the probative value of this evidence depended upon District's having the obligation and requisite financial capability to redesign or enlarge the channel to accommodate increased flows. Davis Pacific abandoned its argument that District had the obligation to redesign the facility and presents no persuasive authority that District had such fiscal capability.

On rehearing, Davis Pacific contends that Water Code Appendix 46-7.1 grants District the ability to control development by setting forth a scheme of allowable fees. However, funding is limited by the enabling legislation. (Wat. Code App., §§ 46-12, 46-12.2.) Assessments levied in a particular zone can be spent only in that zone. (Wat. Code App., §§ 46-7.1(b)(1), 46-7.1(d).) Davis Pacific's own expert testified that there was no legislation that permitted the District to increase design capacity in response to upstream development.

Davis Pacific infers that application of the rule of reasonable use would mandate a different result as the court also based its ruling on the natural-watercourse rule. We disagree. The natural-watercourse rule provides that an upstream owner who builds an improvement which increases the volume of water coming to the lower riparian owner's land, but which does not divert the waters in the stream, is not liable for damages caused by the increased flow. *Ellison* v. *City of San Buenaventura* (1976) 60 Cal.App.3d 453, 457.) The rationale for this rule has been to permit an upper landowner to protect his land against the stream, thereby making the land available for improvement or settlement. (*Id.*, at p. 457.) The rule also grants immunity to upper landowners for damage to lower landowners caused by increased silt and debris if

the upper landowner merely fends the intruding waters from his land in a reasonable and prudent manner. (*Ellison, supra,* 60 Cal.App.3d at p. 457.)

However, under the natural-watercourse rule, if the natural-watercourse itself is obstructed or diverted, the party responsible therefor is liable for the resultant damage to property. (*Granone* v. *County of Los Angeles* (1965) 231 Cal.App.2d 629, 646.) Similarly, when water is diverted out of a natural channel, the party responsible is liable for the resultant damage to the property of others, absent the necessity of protecting one's property in time of peril under the common enemy doctrine. (*Ibid.*) The natural-watercourse rule was last reaffirmed by the California Supreme Court in 1941 in *Archer* v. *City of Los Angeles* 19 Cal.2d 19.

We agree with Davis Pacific that the natural-watercourse rule has been superseded by the rule of reasonable use. Under the rule of reasonable use, damage to downstream landowners from increased or reduced flow of a natural-watercourse is weighed in each case against benefits to upstream landowners from the change. (*Ellison* v. *City of San Buenaventura, supra,* 60 Cal.App.3d 453, 458.)

Keys v. *Romley* (1966) 64 Cal.2d 396 adopted the rule of reasonable use as the rule governing liability for diversion of surface waters. According to *Keys* v. *Romley,* reasonableness becomes a question of fact to be determined case by case, considering all relevant circumstances including factors such as the amount of harm caused, foreseeability of harm which results, the purpose or motive with which the possessor acted, and all other relevant matters. (*Id.,* at p. 410.) Although *Keys* considered the common enemy doctrine and not the natural-watercourse rule, there seems no longer a valid reason for drawing distinctions between surface waters and those

that flow through a natural-watercourse in ascertaining rights and obligations of the respective property owners. (See 3 Miller & Starr, Current Law of California Real Estate (1977) § 21:47, at p. 594.)

District contends that the Supreme Court in *Keys* v. *Romley* did not contemplate the extensive political and social issues involved in upstream development in an entire watershed or the ramifications of abandoning the natural-watercourse rule in such a case. Nonetheless, the rule of reasonableness is not inconsistent with District's legitimate concern about land development in the watershed and a public entity's inability to control it. Since reasonableness is already a factor in determining the liability of a public entity for maintaining a dangerous condition (Gov. Code, §§ 830.6, 835.4), we see no undue hardship in replacing the natural-watercourse rule with the rule of reasonableness.[1]

However, adoption of this rule would not change District's duty to maintain the facility as built into a duty to redesign or increase capacity without the requisite funding. Consequently, adoption of the rule of reasonable use would not mandate a different result.

The jury was informed that District had notice the flows could and did exceed design capacity. The reason for the higher flows was irrelevant. Since Davis Pacific acknowledges District was not obligated to redesign or upgrade the facility, we fail to see what difference to its cash further evidence of increased flow would have made. The trial court was within its discretion in finding presentation of this additional evidence to be unduly time-

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[1]Davis Pacific requests that we take judicial notice of briefs filed in *Deckert* v. *County of Riverside* (1981) 115Cal.App.3d 885, 891. The request is denied.

consuming. Moreover, Davis Pacific's protestations to the contrary, the inescapable inference would be that District *did* have a duty to construct a larger facility in the face of increased flow from upstream development. Consequently, the trial court did not abuse its discretion in excluding evidence of upstream development.

Davis Pacific contends, on rehearing, that the evidence was relevant to a duty to warn even if there was no obligation to build a bigger channel. (See Gov. Code, § 830.6.) We need not consider a point raised for the first time in appellant's reply brief. (*Balboa Ins. Co.* v. *Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) The basic weakness in appellant's case is that, as pleaded and argued in the hearing on District's motion to exclude evidence of upstream development, District knew upstream development was causing an increased flow in the channel and that knowledge triggered a responsibility to act reasonably, which included an obligation to redesign or enlarge the channel to meet changing conditions, an argument not pursued here. (See *Baldwin* v. *State of California* (1972) 6 Cal.3d 424.)

Throughout its briefs on appeal, Davis Pacific conceded that the levee's being two feet below design specifications, by itself, does not establish negligent maintenance, breach of contract or nuisance. Nor does the knowledge that it was capable of withstanding higher flows on two occasions. Only if District had a duty to redesign, enlarge or raise the level to design height could Davis Pacific prevail on these causes of action. Since Davis Pacific conceded District had no such duty, it attempted to establish negligence and breach of contract by showing that the levee subsided two feet due to District's negligent maintenance.

However, even assuming that the levee subsided two feet, there was *no* evidence it was incapable of carrying its designed capacity. In fact, there was abundant evidence that it carried more than that. Thus, Davis Pacific failed to establish that District had a duty to do more than it did — maintain the channel to carry its design capacity. (*Tri-Chem, Inc.* v. *Los Angeles County Flood Control Dist., supra,* 60 Cal.App.3d 306, 312.) Consequently, it is unnecessary to discuss the alleged instructional errors since appellant has failed to establish a duty which District breached. (See *Davidson* v. *City of Westminster* (1982) 32 Cal.3d 197, 202.)

2. *Trial Court Properly Denied Liability for Inverse Condemnation.*

Davis Pacific argues that District's "uncontroverted and exclusive maintenance of the Calleguas project clearly establishes condemnation liability as a matter of law." Davis Pacific asserts that since District approved the project and is obligated to maintain it, and the project failed, causing damage to plaintiff's property, these facts establish inverse condemnation.

In the trial court's statement of decision, it found as fact finder on the cause of action for inverse condemnation, that the failure of the levee was not by overtopping, the levee "having failed by scour and/or tractive forces exceeding design limitation resulting in an undermining and/or destruction of rip-rap protection that caused predominantly sand levees to be exposed to erosion by flood flows." The court also found the mechanism of failure to be irrelevant because the levee service road above the rock rip-rap at or near Station 148 on the west levee of the creek was not installed by SCS to design heights, that District reasonably maintained the SCS facility at the lower Calleguas Creek in the condition it

was turned over to the District, and that plaintiff's damage did not occur because of the design or any maintenance of the lower Calleguas Creek.

The court found that District was under no duty to provide an indestructible facility, that District performed its maintenance task well, and that the system, as constructed and maintained, reduced the natural flooding of plaintiff's property. The water flow from the storms exceeded the carrying capacity of the improved channel, which proximately caused the breach of the levee and the resulting damage. The court concluded that District was under no duty to provide plaintiff with a channel having an increased capacity to meet changing conditions attributable to anticipated, foreseeable upstream urbanization.

Davis Pacific asserts that the trial court relied upon incorrect legal theories. However, the question before us is whether its ruling is sustainable on any ground. (*West Pico Furniture Co.* v. *Superior Court* (1961) 56 Cal.2d 407, 414; *Stone* v. *L. A. County Flood Control Dist., supra,* 81 Cal.App.2d 902, 907.) It is.

The area of inverse condemnation which, in times past, appeared fairly clear has, like the waters in Calleguas Creek, become murky. The principle is easily stated: whether foreseeable or not, physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable under the California Constitution, article I, section 19 (formerly § 14) except in cases of damage which the state had a right to inflict at common law or has the right to inflict in the exercise of its police power. (*Holtz* v. *Superior Court* (1970) 3 Cal.3d 296, 304; *Albers* v. *County of Los Angeles* (1965) 62 Cal.2d 250, 262.)

The "right to inflict injury" exception was based upon a private riparian owner's right to collect surface waters on his land and channel them into a stream into which they would naturally drain even though this resulted in the flooding of lower lands. (See *Archer* v. *City of Los Angeles, supra,* 19 Cal.2d 19, 24.) Based upon this fundamental principle, the court was not required to go further than hold that the state was not required to pay for damages which it had a right at common law to cause if it were a private citizen under the "common enemy" doctrine or natural-watercourse rule. (*Holtz, supra,* at p. 306; *Archer* at p. 24.) The decisive consideration was one of public policy, i.e., whether the owner of damaged property if uncompensated would contribute more than his proper share to the public undertaking. (*Clement* v. *State Reclamation Board* (1950) 35 Cal.2d 628, 638-642.)

However, as the Supreme Court in *Holtz* stated "[t]he fulfillment of the broad 'cost spreading' purpose of the constitutional provision, as clarified in *Albers,* requires a limited application of the *Archer* exception . . . . The doctrine of the common law 'right to inflict damage,' emanating from the complex and unique province of water law, has been employed in only a few restricted situations, generally for the purpose of permitting a landowner to take reasonable action to protect his own property from external hazards such as floodwaters." (*Holtz* at p. 306.) As *Holtz* indicated, the essential common characteristic of this category of cases is that they all involve injury resulting from the landowner's efforts to protect his own property from damage. (*Id.* at pp. 306-307.) Moreover, the Supreme Court noted that "even when a public agency is engaged in such 'privileged activity' as the construction of barriers to protect against floodwaters, it must act reasonably and non-negligently." (3 Cal.3d 296, 207, fn. 12.)

The Supreme Court in *Albers* stated that, *with the exception of Archer* (and the police power), any physical injury to real property proximately caused by improvements as deliberately designed and constructed is compensable, whether foreseeable or not. (62 Cal.2d 250, 262.) Since, as we discussed *supra,* the rule of reasonable use replaced the immunity of the "common enemy doctrine" concerning surface waters, and we find that this rule is equally applicable to flood waters and the natural-watercourse rule, would application of the rule of reasonable use mandate a different result? We think not, even accepting that a public entity may be liable for engaging in an activity which would have been "privileged," and may be reasonable, for a private landowner. (See *Holtz* v. *Superior Court, supra,* 3 Cal.3d 296, 308, fn. 13.)

To impose liability based upon the rule of reasonable use, Davis Pacific must show that District's conduct was *unreasonable* before the court would be required to balance the benefits of District's improvements against the detriment assertedly suffered by Davis Pacific. (*Ellison* v. *City of San Buenaventura, supra,* 60 Cal.App.3d 453, 458.) Since District did not have the financial capability to construct or redesign a larger facility, appellant failed to show unreasonable conduct.

The question is one of causation. We agree with Davis Pacific's assertion that principles of negligence are not essential or even relevant to inverse condemnation. (*Holtz, supra,* 3 Cal.3d at 303.) *Holtz* noted that the term "proximate cause" is confusing because in tort law it is often defined as foreseeability, a concept of negligence, and might be defined more precisely as "substantial factor." (3 Cal.3d 296, 304, fn. 9; Van Alstyne, *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 435-438.) However. a factor common

to both proximate cause in the tort sense and in inverse condemnation is public policy.

According to Davis Pacific's definition of inverse condemnation, failure of a public improvement would impose absolute liability on the public that maintains it. *Holtz* did not so hold. The defendants in *Holtz* did not contend there was an absence of the requisite degree of causation. (3 Cal.3d 296, 304 fn. 9.) Here they do.

The flood control channel was designed and constructed to carry 15,000 cfs plus a safety factor. There is no design error alleged. District did nothing which altered the channel's ability to function at its design capacity (see *Bauer* v. *County of Ventura* (1955) 45 Cal.2d 276, 285) or impair its function at that capacity (see *McMahan's of Santa Monica* v. *City of Santa Monica* (1983) 146 Cal.App.3d 683, 696).

Nonetheless, Davis Pacific argues that District is not insulated from liability because it did not originally construct the improvement if it accepted or otherwise approved it. (*Souza* v. *Silver Development Co.* (1985) 164 Cal.App.3d 165, 170.) It is true that unlike negligence, inverse condemnation does not require any breach of a standard of care, nor foreseeability of the harm. (*Aetna Life & Casualty Co.* v. *City of Los Angeles* (1985) 170 Cal.App.3d 865, 873.) "All that is required is a deliberate act by a public entity which has as its object the direct or indirect accomplishment of the purpose for which the improvement was constructed and which causes a taking or damaging of private property." (*Id.*, at p. 874.) Approval of plans and acceptance of an improvement improperly designed or constructed has been held to subject a public entity to liability where the project as designed and constructed caused damage. (See *Yee* v. *City of Sausalito* (1983) 141 Cal.App.3d 917 (soil subsidence);

Imperial Cattle Co. v. *Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 270 (flooding of feedlot); *Yox* v. *City of Whittier* (1986) 182 Cal.App.3d 347 (runoff surface waters); *Sheffet* v. *County of Los Angeles* (1970) 3 Cal.App.3d 720 (surface waters).)

Here, District performed no deliberate act which caused damage to Davis Pacific's property. The project as designed and constructed did *not* cause the damage. Storm waters far exceeding the design and construction parameters of the improvement caused the damage. Although the trial court's findings may have confused concepts of negligence with inverse condemnation, its conclusion was correct. There must be a showing of "a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury." (*Souza* v. *Silver Development Co., supra*, 164 Cal.App.3d 165, 171.)

Davis Pacific's reliance on *House* v. *L. A. County Flood Control Dist.* (1944) 25 Cal.2d 384 is misplaced. There, plaintiff alleged that defendant removed a safe and secure protection to her land and substituted an unsafe, carelessly and negligently planned bank or wall, resulting in inundation of her property which had never before been visited by river waters. (25 Cal.2d at 390.)

On rehearing, appellant contends the evidence showed that the farmers' levees adequately protected the property before SCS built the present improvements. We disagree. Substantial evidence supports the trial court's finding that SCS built the flood control because the farmer's levees were not adequate to protect the land from flooding and that, indeed, the land *did* flood despite the levees. By agreeing to maintain the channel as built by SCS, District did not become an insurer against any and all flooding on private property. (*Stone* v. *L. A. County*

Flood Control Dist., supra, 81 Cal.App.2d 902, 912; *House* v. *L. A. County Flood Control Dist., supra*, 25 Cal.2d 384, 392; see also *Tri-Chem. Inc.* v. *Los Angeles County Flood Control Dist., supra*, 60 Cal.App.3d 306, 312.)

The judgment is affirmed. Each party to bear its own costs.

NOT TO BE PUBLISHED

STONE, P. J.

We concur:

GILBERT, J.

ABBE, J.

William L. Peck, Judge

Superior Court County of Ventura

Nordman, Cormany, Hair & Compton and Glen M. Reiser for Plaintiff and Appellant.

Spray, Gould & Bowers, Susan B. Gans-Smith and Bruce Alan Finck for Defendant and Respondent.

APPENDIX C

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

DIVISION SIX

DAVIS PACIFIC CORPORATION,
Plaintiff and Appellant,

v.

VENTURA COUNTY FLOOD CONTROL DISTRICT,
Defendant and Respondent.

2d Civil No. B006764
(Super. Ct. No. 71923)
(Ventura County)

Court of Appeal — Second Dist.
FILED: SEP 15, 1987
Robert N. Wilson, Clerk

Davis Pacific Corporation (Davis Pacific) appeals from a judgment in favor of Ventura County Flood Control District (District) on causes of action for inverse condemnation, dangerous condition of public property, nuisance and breach of contract. Davis Pacific asserts a panoply of errors as prejudicial, including (1) exclusion of relevant evidence; (2) refusal to give instructions on concurrent causes and on negligent maintenance as breach of contract; (3) instructing the jury that it could offset benefits of the project as built against damages caused by failure of the levee in 1980; and (4) that the discretionary immunity set forth in Government Code section 820.2 applied to the cause of action for dangerous condition of public property.

In its reply brief, Davis Pacific acknowledges that a review of Government Code section 840 in conjunction with this court's opinion in *Longfellow* v. *County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383 "leads to the inescapable conclusion that a . . . negligent maintenance claim under the Tort Claims Act must necessarily be presented in the context of dangerous condition liability." (Gov. Code, §§ 835-835.4.) Consequently, we need not discuss claimed errors in failing to provide Davis Pacific with a separate and independent theory of negligence or any error affecting the cause of action for nuisance. (See *Longfellow* v. *County of San Luis Obispo, supra,* 144 Cal.App.3d 379, 383.)

We find that the trial court did not abuse its discretion in refusing to allow Davis Pacific to present any evidence of increased flow in the Calleguas Creek caused by upstream development, but did err in instructing the jury that it could offset benefits gained from construction of the project against damages from flood loss, and erred in giving an instruction on discretionary immunity concerning the theory of dangerous condition. Each of these errors was prejudicial and deprived Davis Pacific of a fair trial. We affirm the trial court's ruling denying liability on the theory of inverse condemnation but reverse and remand for retrial on the remaining theories of dangerous condition and breach of contract.

FACTS

Davis Pacific's cause of action is based upon damage to its agricultural land, crops and improvements when the Calleguas Creek channel breached in February 1980. The Calleguas watershed is a 323 square-mile area which includes incorporated cities of Thousand Oaks, Simi Valley, Moorpark and parts of Camarillo. Lower reaches of

the watershed cross farmlands in the eastern part of the Oxnard Plain in Ventura County. Historically, this area is subject to flooding, resulting in alluvial deposits fanning across portions of the Oxnard Plain.

In the 1930's, farmers in the lower Calleguas watershed constructed sand levees to protect their property from flooding to allow farming. As these levees did not eliminate flooding, the Federal Soil Conservation Service (SCS) in 1961, in conjunction with District, the Simi Valley Conservation District and Calleguas Conservation District, designed and constructed levees on the lower Calleguas in place of the farmers' levees. Although District's employees were consulted during the designing of the project, by contract with the SCS, District agreed only to maintain the completed Calleguas project and to obtain easements from local landowners. The agreements negotiated with landowners in exchange for the easements recited that District's duties were to construct and maintain a flood control channel. SCS, responsible under its agreement with District for the design, construction and inspection of the project, hired an engineering firm to carry out the project's design and construction. Generally, the project involved cutting some areas of the old farmers' levees, filling others, adding rock rip-rap on the inside of the channel to a depth of three feet below the bottom of the channel (due to liquidity of the sandy bottom at high flows), and clearing the extensive vegetation in the bottom.

The project was designed to carry 15,000 cubic feet of water per second (cfs), and as designed, substantially concentrated the water flow compared to the previous water dispersion from the farmers' levees. In February 1969 District measured the flow in the lower Calleguas at 16,300 cfs, and in March 1978 at 18,700 cfs. May 23, 1979,

one of District's engineers, in measuring the west levee of the Calleguas Creek, discovered that it was two feet below design specifications.

February 16, 1980, while at a flow of 25,190 cfs, Calleguas Creek broke the levee at Station 148, causing flooding, deposition of thousands of tons of sand and debris over 100 acres of Davis Pacific's property, destruction of crops and equipment, and injury to the quality of the soil. Total damages claimed by Davis Pacific were $1,844,691.98.

At trial, Davis Pacific's theory was that the breach in the levee was due to "overtopping" caused by failure to maintain the levee at its design level. District's theory was that the levee had not been built to specification but that District had properly maintained the project as constructed. Additionally, District theorized that the levee broke due to undermining, not through any fault of District, but because the flow greatly exceeded design capacity.

District moved *in limine* to exclude any evidence of upstream development and to prevent presentation of evidence that District was aware of increased flow due to upstream development. District contended that this evidence created an inference that District had a duty to upgrade the capacity of the channel or improve the design rather than simply maintain the project. The court agreed that the evidence implied a duty the court did not find District had and that presentation of the evidence would be unduly time-consuming. The court granted the motion pursuant to Evidence Code section 352. The trial court did allow Davis Pacific to introduce evidence that District had measured levels above design capacity on two occasions.

The trial court allowed District to present evidence, and instructed the jury, that Davis Pacific's damages from the flood would be offset by benefits conferred by the project as built by SCS. District's expert calculated these benefits to be $1,878,000. The trial court, ruling on the issue of liability on the inverse condemnation theory, found in favor of District and the jury returned a general verdict in District's favor on the remaining theories of dangerous condition, nuisance, and breach of contract. Davis Pacific's motion for new trial was denied.

DISCUSSION

1. *Evidence of Upstream Development.*

In the hearing on District's motion to exclude evidence of upstream development, Davis Pacific contended that in determining District's responsibility to maintain the levees as designed and constructed as it related to their knowledge of a dangerous condition, the jury and the trial court should have the benefit of knowing what the District knew that upstream development was causing an increase in the flow of the channel. This evidence was relevant, Davis Pacific contended, to the reasonableness of District's actions. Davis Pacific also argued this evidence was relevant to whether District had an obligation to redesign or upgrade the project as conditions changed — an argument they now eschew. The given facts were: (1) the channel was designed to contain a 50-year flood flow of 15,000 cfs; (2) the channel failed at 25,190 cfs; and (3) District was obliged to maintain the levee to the height as built by SCS when District accepted it in February 1961. The crucial questions were the condition and height of the levee when conveyed to District, the cause of the levee's failure, and the possibility of District's negligence in maintaining it. There were two separate fact finders —

the trial court as to inverse condemnation and the jury as to the remaining causes of action.

The trial court held that presentation of evidence of District's knowledge of increased flow was "contrary to existing law" and would place an undue financial burden on District. Davis Pacific requested that minimally it be allowed to cross-examine District's witnesses on their knowledge of anticipated flow and that the court give a limiting instruction to the jury that District had no duty to build a bigger channel. The court refused the request because it believed the implication would still remain that District had a duty to improve the project if it had knowledge of increased flow due to upstream development. The trial court ruled that District had no duty to handle additional runoff resulting from extensive upstream development.

District contends that upstream development is irrelevant to any negligence on its part in maintaining a dangerous condition since its only duty was to maintain the facility as built and to not make matters worse. (*Tri-Chem, Inc.* v. *Los Angeles County Flood Control Dist.* (1976) 60 Cal.App.3d 306, 312.) It asserts that it had no mandatory direction under the statutes that created it (Wat. Code App., 46-1 et seq.) to build public improvements of any particular design or, in fact, to build any improvements at all. (*Stone* v. *L. A. County Flood Control Dist.* (1947) 81 Cal.App.2d 902, 912.)

District further argues that to hold otherwise would create duties on the part of a flood control district which it could not afford to carry out, that it has no power to increase the capacity of the channel, nor does it have the funds since specific enabling legislation provides specific funding limitations. (See Wat. Code App., §§ 46-12, 46-12.2.) Additionally, imposing this burden would give

little, if any, incentive for a public entity to extend its aid at all. (See *Janssen* v. *County of Los Angeles* (1942) 50 Cal.App.2d 45, 56-57.) We agree.

The trial court has discretion to exclude evidence if it determines that the probative value is substantially outweighed by the probability that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice. (Evid Code, § 352.) Its decision will not be reversed on appeal unless there is a manifest abuse of discretion resulting in a miscarriage of justice. (See *Baker* v. *Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 338-339; Cal. Const., art. VI, § 13.)

To prove a dangerous condition of public property, a plaintiff must establish that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which occurred, and that either: (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. (Gov. Code, § 835.)

A public entity has actual notice of a dangerous condition within the meaning of subdivision (b) if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. (§ 835.2, subd. (a).) A public entity has constructive notice within the meaning of subdivision (b) only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in exercise of due care, should have discovered the

condition and its dangerous character. (§ 835.2, subd. (b).)

Here, the exclusion of evidence of increased flow due to upstream development did not prejudice Davis Pacific since there was evidence of higher flows at two different times. The reason for the higher flows was irrelevant. The jury was informed that District had notice the flows could and did exceed design capacity. Since Davis Pacific acknowledges District was not obligated to redesign or upgrade the facility, we fail to see what difference further evidence of increased flow would have made. The trial court was within its discretion in finding presentation of this additional evidence to be unduly time-consuming. Moreover, Davis Pacific's protestations to the contrary, the inescapable inference would be that District *did* have a duty to construct a larger facility in the face of the increased flow from upstream development.

Consequently, the trial court did not abuse its discretion in excluding evidence of upstream development.

Davis Pacific infers that application of the rule of reasonable use would mandate a different result as the court also based its ruling on the natural-watercourse rule. Again, we disagree. The natural-watercourse rule provides that an upstream owner who builds an improvement which increases the volume of water coming to the lower riparian owner's land, but which does not divert the waters in the stream, is not liable for damages caused by the increased flow. (*Ellison* v. *City of San Buenaventura* (1976) 60 Cal.App.3d 453, 457.) The rationale for this rule has been that " ' . . . Not to permit an upper land owner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy. Such a rule would

seriously interfere with the development of the country. . . .' " (*Id.,* at p. 457.) The natural-watercourse rule was last reaffirmed by the California Supreme Court in 1941 in *Archer* v. *City of Los Angeles* 19 Cal.2d 19. The rule also grants immunity to upper landowners for damage to lower landowners caused by increased silt and debris if the upper landowner merely fends the intruding waters from his land in a reasonable and prudent manner. (*Ellison, supra,* 60 Cal.App.3d at p. 457.)

However, under the natural-watercourse rule, if the natural-watercourse itself is obstructed or diverted, the party responsible therefor is liable for the resultant damage to property. (*Granone* v. *County of Los Angeles* (1965) 231 Cal.App.2d 629, 646.) Similarly, when water is diverted out of a natural channel, the party responsible is liable for the resultant damage to the property of others, absent the necessity of protecting one's property in time of peril under the common enemy doctrine. (*Ibid.*)

Davis Pacific contends, incorrectly, the rule is inapplicable because District diverted waters onto its land when the levee broke. The flooding of Davis Pacific's property was a result of the levee's failure, but not a consequence of District's intentionally changing the direction of the flow in the Calleguas Creek, which had no defined course before the project was built. Nevertheless, we agree with Davis Pacific that the natural-watercourse rule has been superseded by the rule of reasonable use. Under the rule of reasonable use, damage to downstream landowners from increased or reduced flow of a natural-watercourse is weighed in each case against benefits to upstream landowners from the change. (*Ellison* v. *City of San Buenaventura, supra,* 60 Cal.App.3d 453, 458.)

Keys v. *Romley* (1966) 64 Cal.2d 396 adopted the rule of reasonable use as the rule governing liability for

diversion of surface waters. According to *Keys* v. *Romley,* reasonableness becomes a question of fact to be determined case by case, considering all relevant circumstances including factors such as the amount of harm caused, foreseeability of harm which results, the purpose or motive with which the possessor acted, and all other relevant matters. (*Id.,* at p. 410.) Although *Keys* considered the common enemy doctrine and not the natural-watercourse rule, there seems no longer a valid reason for drawing distinctions between surface waters and those that flow through a natural-watercourse in ascertaining rights and obligations of the respective property owners. (See 3 Miller & Starr, Current Law of California Real Estate (1977) § 21:47, at p. 594.)

District contends that the Supreme Court in *Keys* v. *Romley* did not contemplate the extensive political and social issues involved in upstream development in an entire watershed or the ramifications of abandoning the natural-watercourse rule in such case. Nonetheless, the rule of reasonableness is not inconsistent with District's legitimate concern about land development in the watershed and a public entity's inability to control it. Since reasonableness is already a factor in determining the liability of a public entity for maintaining a dangerous condition (Gov. Code, §§ 830.6, 835.4), we see no undue hardship in replacing the natural-watercourse rule with the rule of reasonableness.[1]

However, adoption of this rule would not change District's duty to maintain the facility as built into a duty to redesign or increase capacity since District has no control

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[1]Davis Pacific requests that we take judicial notice of briefs filed in *Deckert* v. *County of Riverside* (1981) 115 Cal.App.3d 885, 891. The request is denied.

over upstream development. Consequently, adoption of the rule of reasonable use would not mandate a different result.

2. *Discretionary Immunity Instruction.*

Public entity liability for property defects is not governed by the general rule of vicarious liability provided in section 815.2, but instead by the specific provisions set forth in sections 830-835.4. (*Van Kempen* v. *Hayward Area Park Etc. Dist.* (1972) 23 Cal.App.3d 822, 825; *Longfellow* v. *County of San Luis Obispo, supra,* 144 Cal.App.3d 379, 383.) Section 815.2, subdivision (b) provides that "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." The Legislative Committee Comment to that section indicates that the exception appears because "under certain circumstances it appears to be desirable to provide by statute that a public entity is liable even when the employee is immune. For example, Chapter 2 (commencing with Section 830) provides that a public entity may be liable for a dangerous condition of public property even though no employee is personally liable."

Section 820.2 provides that "Except as otherwise provided by statute, a public *employee* is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion is abused." (Emphasis added.)

The Legislative Committee Comment to section 835, setting forth conditions of liability for dangerous condition of public property, states: "The section is not subject to the discretionary immunity that public entities derive

from Section 815.2, for this chapter itself declares the limits of a public entity's discretion in dealing with dangerous conditions of its property. [¶] Liability does not necessarily exist if the evidentiary requirements of this section are met. Even if the elements stated in the statute are established, a public entity may avoid liability it if shows that it acted reasonably in the light of the practicability and cost of pursuing alternative courses of action available to it. . . ."

Thus, it appears clear that " . . . the provisions of the [Tort Claims] act imposing liability for dangerous conditions of public property (Govt C §§ 835-835.4) are manifestly designed to be applied without reference to the discretionary immunity rule of Govt C § 820.2." (Van Alstyne, Calif. Gov. Tort Liability Practice (Cont.Ed.Bar 1980) § 2.27, p. 68.) Legislative Committee Comments limiting an immunity have been given effect when the language of the code section did not contain language limiting the immunity. (See *Milligan* v. *City of Laguna Beach* (1983) 34 Cal.3d 829, 832, fn. 2; *Baldwin* v. *State of California* (1972) 6 Cal.3d 424, 433.)

Davis Pacific presented a jury instruction based upon section 820.2 for its cause of action in negligence, refused by the court because it hinged upon the excluded evidence of upstream development. However, the trial court modified the instruction to read that "California law provides that as a defense to the causes of action for maintenance of a dangerous condition and nuisance a public employee or public entity is not liable for an injury resulting from any act or omission where the act or omission was the result of the exercise of the discretion vested in a public employee, whether or not such discretion was abused." and "To find defendant immune from liability for discretionary acts or omissions, you must find that the injuries

and damages complained of were the proximate result of the exercise of discretion vested in the public employee."

Thus, not only did the trial court provide District with the proper defense of reasonableness set out in BAJI Nos. 11.61 and 11.62 (§ 835.4, subd. (a) & (b)), it provided a defense of discretionary immunity which is clear from the Legislative Committee Comments to be inappropriate. Consequently, even if the jury found that District or its employees acted unreasonably it could have found that District was immune from liability if the unreasonable act was discretionary.

District argues that Davis Pacific was not prejudiced because the same policies and considerations are involved in both defenses. We disagree. The discretionary immunity defense does not concern the standard of reasonableness; there is simply no liability for acts or omissions resulting from an exercise of discretion by a public employee under section 820.2 (except as otherwise provided by statute). However, a public entity *may* still be liable for a dangerous condition to public property even though no public employee would personally be liable. (Legislative Committee Comment to § 1815.2.)

District next argues that the error was invited since plaintiff requested the instruction on section 820.2. The record belies this assertion. The trial court crossed out portions of the instruction as submitted, inserted language pertaining to dangerous condition, nuisance and public entity, and the instruction was retyped before giving it to the jury. It is clear from the record that the final retyped instructions after the court modified them did not consistently retain the same numbers as the original instructions presented even though the instructions designated the party who requested the original version. We cannot find that Davis Pacific acceded to this

modified instruction or that is was invited error, especially since, under Code of Civil Procedure section 647, a party is deemed to have taken exception to a requested instruction which the trial court has modified. (Code Civ. Proc., § 647; *Enis* v. *Specialty Auto Sales* (1978) 83 Cal.App.3d 928, 939-940; *Richardson* v. *Employers Liab. Assur. Corp.* (1972) 25 Cal.App.3d 232, 241 disapproved on other grounds in *Gruenberg* v. *Aetna Ins. Co.* (1973) 9 Cal.3d 566, 580-581, fn. 10; *Rivera* v. *Parma* (1960) 54 Cal.2d 313, 316.)

The presumption that the jury reached its verdict on a theory supported by evidence is not applicable where the jury was precluded by erroneous instructions from considering a valid theory upon which a result different from that actually reached might have been supported. (*Clement* v. *State Reclamation Board* (1950) 35 Cal.2d 628, 643.) We cannot assume the jury ignored the improper instruction on discretionary immunity and based its verdict on the proper defense of reasonableness. (*Henderson* v. *Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673.)

3. *Instruction to Offset Special Benefits.*

The trial court, over objection, permitted District to present evidence of "benefits" received from the improvements made as an offset against Davis Pacific's damages. District's expert testified that Davis Pacific's property was worth $1,878,000 more than it would have been without the project. The trial court instructed, over objection, that: "In deciding damages, you are authorized to offset the benefit of the existence of the Calleguas Creek facility as built by the Soil Conservation Service on plaintiff's property with the reasonable damage you find they have suffered to the value of the real property."

If the wrongful act of the defendant at once confers a benefit and inflicts an injury, the loss actually caused will be the net result of the act to the plaintiff, and the net result will be the measure of damages. (*Estate of De Laveaga* (1958) 50 Cal.2d 480, 488.) This rule is based upon the Restatement of Torts 2d section 920, which provides that "[w]hen the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."

However, only benefits special to the plaintiff can be offset. General benefits consist of an increase in value of land, common to the community generally, and resulting from advantages which will accrue to the community from the improvement. (*Sacramento Etc. Drainage Dist.* v. *W. P. Roduner Cattle Etc. Co.* (1968) 268 Cal.App.2d 199, 204.) These cannot be used as an offset. Special benefits, on the other hand, are such as result from the mere construction of the improvement, and are peculiar to the land in question. (*Podesta* v. *Linden Irr. Dist.* (1956) 141 Cal.App.2d 38, 54.) District asserts that the unique and special benefit to Davis Pacific was the lack of enormous deposition of sand and sediment regularly coming down Calleguas Creek. Davis Pacific contends that the project was designed to benefit the entire watershed.

Assuming that the benefits conferred by the project to Davis Pacific were "special" because the project made the land more valuable for farming (see *Sacramento Etc. Drainage Dist.* v. *W. P. Roduner Cattle Etc. Co., supra,* 268 Cal.App.2d 199, 206), there are several reasons why the principle of offset is inapplicable. In the first place, cases District relies upon concern condemnation and severance

damages. By statute, when property acquired in condemnation is part of a larger parcel, *in addition to compensation awarded* for the part taken, compensation shall be awarded for injury, if any to the remainder and the condemnor is entitled to offset special benefits conferred to the remainder against *severance* damages. (Code Civ. Proc., § 1263.410 et seq.)

Here, there are no severance damages against which to offset since the only damages to be awarded would have been for all the property damaged. Moreover, special benefits are to be assessed as of the date of the taking. (*People* v. *Thomas* (1952) 108 Cal.App.2d 832, 838.) The "taking" alleged was not of the easements to build the project in 1960 but damage caused by District's alleged tortious conduct which caused the levee to break in 1980. Additionally, the benefit must be a direct result of the tort. (Rest.2d, Torts. § 920, subd. (d); see *Custodio* v. *Bauer* (1967) 251 Cal.App.2d 303, 320-325.) There is no evidence that that "taking" or alleged tortious conduct in February 1980 benefitted Davis Pacific's property at all.

District argues it could offset the damages under a theory of contract. However, under the right-of-way contracts, District was obligated to repair and maintain the project in exchange for the easements. It was not to receive payments for this obligation and, therefore, would have no concomitant offset.

As Davis Pacific points out, since its net flood damage was $1,844,691.98, it did not take a mathematical wizard to calculate that District's alleged $1,878,000 "contribution" to Davis Pacific's property exceeded Davis Pacific's claim. District asserts the instruction would only be relevant if the jury found for plaintiff on liability but awarded no damages. Since the jury returned a general verdict in favor of District, we do not know whether it

determined liability first or simply decided, on the theory of "no harm, no foul", that since the benefit was greater than the damages claimed, defendant prevailed.

From our examination of the entire record, we conclude that the errors discussed were prejudicial and resulted in a miscarriage of justice which necessitates reversal on the theories of dangerous condition of public property and breach of contract. (*Henderson* v. *Harnischfeger Corp., supra,* 123 Cal.3d 663, 674; Cal. Const., art. VI, § 13.)

4. *Trial Court Properly Denied Liability for Inverse Condemnation.*

Davis Pacific argues that District's "uncontroverted and exclusive maintenance of the Calleguas project clearly establishes condemnation liability as a matter of law." Davis Pacific asserts that since District approved the project and is obligated to maintain it, and the project failed, causing damage to plaintiff's property, these facts establish inverse condemnation.

In the trial court's statement of decision, it found as fact finder on the cause of action for inverse condemnation, that the failure of the levee was not by overtopping, the levee "having failed by scour and/or tractive forces exceeding design limitation resulting in an undermining and/or destruction of rip-rap protection that caused predominantly sand levees to be exposed to erosion by flood flows." The court also found the mechanism of failure to be irrelevant because the levee service road above the rock rip-rap at or near Station 148 on the west levee of the creek was not installed by SCS to design heights, that District reasonably maintained the SCS facility at the lower Calleguas Creek in the condition it was turned over to the District, and that plaintiff's dam-

age did not occur because of the design or any maintenance of the lower Calleguas Creek.

The court found that District was under no duty to provide an indestructible facility, that District performed its maintenance task well, and that the system, as constructed and maintained, reduced the natural flooding of plaintiff's property. The water flow from the storms exceeded the carrying capacity of the improved channel, which proximately caused the breach of the levee and the resulting damage. The court concluded that District was under no duty to provide plaintiff with a channel having an increased capacity to meet changing conditions attributable to anticipated, foreseeable upstream urbanization. In other words, the trial court found that District did not proximately cause Davis Pacific's damage.

A court's findings will be upset only when there is no substantial evidence to support them. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Stevens* v. *Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64.) Although a properly instructed jury could have reached a different conclusion on the remaining causes of action, there is substantial evidence to support the trial court's factual findings. Davis Pacific asserts that the trial court relied upon incorrect legal theories. However, the question before us is whether its ruling is sustainable on any ground. (*West Pico Furniture Co.* v. *Superior Court* (1961) 56 Cal.2d 407, 414; *Stone* v. *L. A. County Flood Control Dist., supra,* 81 Cal.App.2d 902, 907.) It is.

The area of inverse condemnation which, in times past, appeared fairly clear has, like the waters in Calleguas Creek, become murky. The principle is easily stated: whether foreseeable or not, physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable

under the California Constitution, article I, section 19 (formerly § 14) except in cases of damage which the state had a right to inflict at common law or has the right to inflict in the exercise of its police power. (*Holtz* v. *Superior Court* (1970) 3 Cal.3d 296, 304; *Albers* v. *County of Los Angeles* (1965) 62 Cal.2d 250, 262.)

The "right to inflict injury" exception was based upon a private riparian owner's right to collect surface waters on his land and channel them into a stream into which they would naturally drain even though this resulted in the flooding of lower lands. (See *Archer* v. *City of Los Angeles, supra,* 19 Cal.2d 19, 24.) Based upon this fundamental principle, the court was not required to go further than hold that the state was not required to pay for damages which it had a right at common law to cause if it were a private citizen under the "common enemy" doctrine or natural-watercourse rule. (*Holtz, supra,* at p. 306; *Archer* at p. 24.) The decisive consideration was whether the owner of damaged property if uncompensated would contribute more than his proper share to the public undertaking. (*Clement* v. *State Reclamation Board, supra,* 35 Cal.2d 638, 642.)

However, as the Supreme Court in *Holtz* pointed out, "[t]he fulfillment of the broad 'cost spreading' purpose of the constitutional provision, as clarified in *Albers,* requires a limited application of the *Archer* exception . . . . The doctrine of the common law 'right to inflict damage,' emanating from the complex and unique province of water law, has been employed in only a few restricted situations, generally for the purpose of permitting a landowner to take reasonable action to protect his own property from external hazards such as floodwaters." (*Holtz* at p. 306.) As *Holtz* pointed out, the essential common characteristic of this category of cases is that they all involve injury

resulting from the landowner's efforts to protect his own property from damage. (*Id.,* at pp. 306-307.) Moreover, the Supreme Court noted that "even when a public agency is engaged in such 'privileged activity' as the construction of barriers to protect against floodwaters, it must act reasonably and non-negligently." (3 Cal.3d 296, 307, fn. 12.)

The Supreme Court in *Albers* stated that, *with the exception of Archer* (and the police power), any physical injury to real property proximately caused by improvements as deliberately designed and constructed is compensable, whether foreseeable or not. (62 Cal.2d 250, 262.) Since, as we discussed *supra,* the rule of reasonable use replaced the immunity of the "common enemy doctrine" concerning surface waters, and we find that this rule is equally applicable to flood waters and the natural-watercourse rule, would application of the rule of reasonable use mandate a different result? We think not, even accepting that a public entity may be liable for engaging in an activity which would have been "privileged", and may be reasonable, for a private landowner. (See *Holtz* v. *Superior Court, supra,* 3 Cal.3d 296, 308, fn. 13.)

The question in inverse condemnation is causation. The trial court found that District adequately and reasonably maintained the channel and that neither maintenance nor the two-feet difference in design height caused Davis Pacific's damage. The court found that evidence indicated the extra two-feet would not have prevented the break in the levee. The channel was simply not designed to accept 25,000 cfs of water flow.

Davis Pacific contends that "maintenance" and "construction" are synonymous for purposes of inverse condemnation. We agree that the terms *can* be synonymous where a public entity alters the original construction in

such a manner that causes damage (*Bauer* v. *County of Ventura* (1955) 45 Cal.2d 276, 285) or deliberately adopts a plan of maintenance and repair that it knows is inadequate. (*McMahan's of Santa Monica* v. *City of Santa Monica* (1983) 146 Cal.App.3d 683, 696.) Applying these principles, District's maintenance would rise to the level of construction if it deliberately changed or altered the improvement as constructed or failed to replace or repair the improvement as constructed and its action (or deliberate inaction) caused or was a substantial cause of Davis Pacific's damage.

Nonetheless, Davis Pacific argues that District is not insulated from liability because it did not originally construct the improvement if it accepted or otherwise approved it. (*Souza* v. *Silver Development Co.* (1985) 164 Cal.App.3d 165, 170.) However, District is not an insurer against all possible damages that might be inflicted on private property. (*Stone* v. *L. A. County Flood Control Dist., supra,* 81 Cal.App.2d 902, 912; *House* v. *L. A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 392; see also *Tri-Chem, Inc.* v. *Los Angeles County Flood Control Dist., supra,* 60 Cal.App.3d 306, 312.) It is true that unlike negligence, inverse condemnation does not require any breach of a standard of care, nor foreseeability of the harm. (*Aetna Life & Casualty Co.* v. *City of Los Angeles* (1985) 170 Cal.App.3d 865, 873.) "All that is required is a deliberate act by a public entity which has as its object the direct or indirect accomplishment of the purpose for which the improvement was constructed and which causes a taking or damaging of private property." (*Id.,* at p. 874.) Approval of plans and acceptance of an improvement improperly designed or constructed may well subject a public entity to liability where the project as designed and constructed causes damage. (See *Yee* v. *City of Sausalito* (1983) 141 Cal.App.3d 917 (soil subsi-

dence); *Imperial Cattle Co.* v. *Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 270 (flooding of feedlot); *Yox* v. *City of Whittier* (1986) 182 Cal.App.3d 347 (runoff surface waters); *Sheffet* v. *County of Los Angeles* (1970) 3 Cal.App.3d 720 (surface waters).)

Based upon the trial court's factual findings which are supported by substantial evidence, the only act which District deliberately undertook was to accept responsibility for maintenance and repair of the project. The project was reasonably and adequately designed in 1961 and the trial court found that District reasonably and adequately repaired it. There must be a showing of "a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury." *(Souza* v. *Silver Development Co., supra,* 164 Cal.App.3d 165, 171.) Here, Davis Pacific's reliance on *House* v. *L. A. County Flood Control Dist., supra,* 25 Cal.2d 384 is misplaced. There, plaintiff alleged that defendant removed a safe and secure protection to her land and substituted an unsafe, carelessly and negligently planned bank or wall, resulting in inundation of her property which had never before been visited by river waters. (25 Cal.2d at 390.) For defendants to be liable to plaintiffs, their conduct must, minimally, have resulted in more water than would have otherwise flowed onto the plaintiffs' land, which greater quantity results in damage. (*Tri-Chem, Inc.* v. *Los Angeles County Flood Control Dist., supra,* 60 Cal.App.3d 306, 311.) The trial court held that plaintiff had failed to produce a preponderance of evidence that District's conduct resulted in more water flooding their property.

We find substantial evidence supports the trial court's conclusion and affirm its ruling on inverse condemnation but note that the trial court's finding against inverse condemnation would not necessarily be inconsistent with

a jury's finding of liability based upon other conduct, such as negligent maintenance of the improvement within the framework of dangerous condition of public property. (See *Barnhouse* v. *City of Pinole* (1982) 133 Cal.App.3d 171, 196-197, fn. 18.)

5. *Other Alleged Instructional Errors.*

Davis Pacific contends the trial court erred in refusing to give an instruction that negligent performance of a contract may constitute a breach of contract. (See *J. H. Trisdale, Inc.* v. *Shasta Etc. Title Co.* (1956) 146 Cal.App.2d 831; Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 615.) The trial court refused this instruction because it concluded it referred to upstream development. On retrial, the propriety of instructions will depend upon evidence presented.

Similarly, proper instructions on causation will depend upon evidence at retrial. "[A] plaintiff is not required to prove that a tortfeasor's conduct was *the sole* proximate cause of the injury, but only that such negligence was *a* proximate cause." (*American Motorcycle Assn.* v. *Superior Court* (1978) 20 Cal.3d 578, 586. Emphasis in original.) Here, the trial court did instruct that "A proximate cause of an injury, damage loss or harm is a cause which is a substantial factor in bringing about the injury." This instruction would not mislead the jury into believing District's actions or inactions had to be the sole cause. It is unnecessary to discuss other errors alleged.

The judgment is affirmed on the issue of inverse condemnation and reversed and remanded for retrial on the remaining issues of dangerous condition of public property and breach of contract.

Costs to appellant.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

GILBERT, J.

ABBE, J.

C-25

William L. Peck, Judge
Superior Court County of Ventura

Nordman, Cormany, Hair & Compton and Glen M. Reiser for Plaintiff and Appellant.

Spray, Gould & Bowers, Susan B. Gans-Smith and Bruce Alan Finck for Defendant and Respondent.

APPENDIX D

D-1

No. 71923

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STATEMENT OF DECISION

SUPERIOR COURT OF
THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

DAVIS PACIFIC CORPORATION,
ETC., et al.,
Plaintiffs,

vs.

VENTURA COUNTY FLOOD CONTROL DISTRICT,
ETC., et al.,
Defendants.

(California Rules of Court, Rule 232; C.C.P. § 632)

Filed: May 30, 1984
Richard D. Dean, County Clerk
By (Illegible)
Deputy County Clerk

In response to plaintiffs' request, and in compliance with Code of Civil Procedure Section 632, this court makes the following Statement of Decision:

I

With regard to the issue of whether plaintiffs' property sustained damages on February 16, 1980 by flood waters which escaped from lower Calleguas Creek onto plaintiffs' land as a proximate result of public improvements maintained and controlled by defendant, Ventura County Flood Control District, the court's decision is that the evidence presented does not support plaintiffs' cause of action for inverse condemnation as alleged in their complaint.

The court based its decision on the following FACTS:

(1) That the plaintiffs, Davis Pacific Corporation and Pacific Sod Farms, Inc., are owners of land located west of, adjacent to and underlying Calleguas Creek in the County of Ventura;

(2) That plaintiffs' land is situated on a natural flood plain formed by alluvial deposits, deposited in major part by the Calleguas Creek watershed which drains the Simi Valley, Santa Rosa Valley, Las Posas Valley, Conejo Valley, Camarillo and the Thousand Oaks areas of Ventura County;

(3) That before the construction of man-made structures from Hueneme Road down to at least Broome Ranch Road (hereinafter referred to as "lower Calleguas Creek"), Calleguas Creek lacked any defined course, resulting in storm waters spreading over the plaintiffs' land that is the subject matter of this lawsuit;

(4) That the man-made confinements of lower Calleguas Creek constructed prior to 1960 resulted in a channel bottom that was substantially above the surrounding ground; resulted in levees that were subject to erosion and breakout and resulted in a channel that was usually an area of deposition, requiring periodic cleanout if the channel was to hold storm flows;

(5) That during the early 1960's under the local sponsorship of the Calleguas and Simi Soil Conservation Districts, the Soil Conservation Service, a branch of the United States Department of Agriculture, designed and constructed certain improvements in Calleguas Creek which included engineering of the then-existing, predominantly sand, levees to make them more uniform and involved the installation of rock rip-rap on the stream side of the levees (hereinafter referred to as "improvements"). Upon completion of this work by the Soil Conservation Service (hereinafter referred to as SCS), the defendant maintained said improvements;

(6) That the design flow for lower Calleguas Creek improvements as used in the SCS Project was for 15,000 cubic feet per second plus an additional safety factor and the facility was not capable in its design of withstanding 25,000 cubic feet per second for sustained periods at or about Station 148, the area of the breakout that is the subject matter of this lawsuit;

(6.5) That on February 16, 1980, the flood control facility was capable of retaining a flow of 15,000 cubic feet per second.

(7) That on February 15, 1980, at or near a peak flow of Calleguas Creek of 25,190 cubic feet per second, the levees on the west side failed at or near Station 148 on the outside of a curve;

(8) That the mechanism of failure was other than by overtopping, having failed by scour and/or tractive forces exceeding design limitations of the levees engineered and constructed by SCS resulting in an undermining and/or destruction of rip-rap protection that caused the predominantly sand levees to be exposed to erosion by the flood flows; However, the mechanism of failure is irrelevant.

(9) That the levee service roads above the rock rip-rap at or near Station 148 on the west levee of lower Calleguas Creek was not installed by SCS to design heights.

(10) That the Ventura County Flood Control District reasonably maintained the SCS facility at lower Calleguas Creek in the condition it was turned over to the District;

(11) That the plaintiffs' flood damages as alleged in the plaintiffs' complaint did not occur because of the design or any faulty maintenance of lower Calleguas Creek.

II

The legal basis for the court's decision is that the Ventura County Flood Control District was under no duty to construct a flood control system or to provide for an indestructible facility. Its duty was to reasonably maintain the flood control improvements which had been turned over to it by the Soil Conservation Service as constructed. The evidence presented during the trial established that the defendant did in fact provide proper and adequate maintenance of those improvements so as to maintain the integrity of the improvements to withstand design flow. The flood control system, as constructed and maintained, reduced the natural flooding of the plaintiffs' property. The water flow from the storms exceeded the carrying capacity of the improved channel, which proxi-

mately caused the breach of the levee and the resulting damage to plaintiffs' property. Defendant was under no duty to provide plaintiffs with a channel having an increased capacity following the SCS improvements. The District has no obligation to improve the capacity of the channel to meet changing conditions (increased flows) attributable to anticipated, foreseeable upstream urbanization.

For the reasons stated, this court finds no basis for inverse condemnation liability against the defendant, Ventura County Flood Control District.

DATED: May 29, 1984

WILLIAM L. PECK
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 5, 1988, I served the within Petition for Writ of Certiorari in re: "Davis Pacific Corporation vs. Ventura County Flood Control District" in the United States Supreme Court, October Term 1987, No.....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Bruce A. Finch
Spray, Gould & Bowers
5720 Ralston Street
Suite 205
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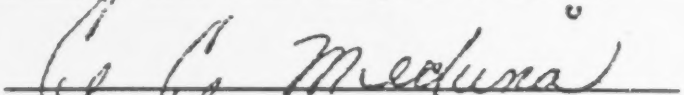
All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on May 5, 1988 at Los Angeles, California



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No. 87-1851

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVIS PACIFIC CORPORATION,
Petitioner,

vs.

VENTURA COUNTY FLOOD CONTROL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent hereby disagrees with the listing of questions presented by petitioner herein in that there have been no appropriate federal questions presented for review. However, if any question can be deemed as having been presented it would be as follows:

1. Whether the Fifth and Fourteenth Amendments require compensation to a private landowner by the public entity which properly and completely maintained a flood control facility at well over its design capacity and its capacity as built, and when the facility had been built by a completely separate entity.

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Defendant and respondent Ventura County Flood Control District hereby provides the within opposition to the petition for certiorari filed by plaintiff and petitioner Davis Pacific Corporation herein.

JURISDICTION

It is submitted that the discretionary decision of the California Supreme Court filed on April 6, 1988, to deny petitioner's petition for review, as well as the decisions of the California Court of Appeal, Second Appellate District, Division 6, and as well as the decision of the trial court in this action should not be reviewed by the United States Supreme Court in that jurisdiction is lacking.

Petitioner cites 28 U.S.C. § 1257 and Rule 17 of the Rules of the United States Supreme Court as authority for jurisdiction herein. However, both Rule 17 and 28 U.S.C. § 1257 require a "federal question," and require said federal question to have been set up and decided in the courts below. It is the position of this opposing party that no federal question has been presented herein by petitioner and no federal question has been brought up below.

It is a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows that the federal claim was adequately presented in the state court system. *Webb v. Webb* (1981) 451 U.S. 493, 496, 101 S.Ct. 1889. As stated in *Webb, supra* at page 499, the Court has consistently refused to decide federal constitutional issues raised for the first time on review of state court decisions. *See also Tacon v. Arizona* (1973) 410 U.S. 351, 352, 35 L.Ed.2d 346, 93 S.Ct. 998, (U.S. Supreme Court cannot decide issues raised for the first time when those questions were not raised by the petitioner below nor passed upon by the state supreme court).

See also Cardinale v. Louisiana (1969) 394 U.S. 437, 438, 439, 22 L.Ed.2d 398, 89 S.Ct. 1162 wherein the court stated as follows:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

The court went on to state:

> "[There is] no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . ."

The *Cardinale* court dismissed the writ for want of jurisdiction in view of that petitioner's failure to raise the issue below and because of the failure of the state court to pass on that issue.

It must *affirmatively* appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Durley v. Mayo* (1956) 351 U.S. 277, 281, 100 L.Ed. 1178, 76 S.Ct. 806.

See also Southwestern Bell Telephone Company v. Oklahoma (1938) 303 U.S. 206, 212, 213, 82 L.Ed. 751, 58 S.Ct. 528, wherein the court stated:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but

> that its decision of the federal question was necessary to the determination of the cause; *that the federal question was actually decided* or that the judgment as rendered could not have been given without deciding it. [Citations.]" (Emphasis added.)

A mere indefinite reference below to the United States Constitution does not present a substantial constitutional question sufficient to confer jurisdiction upon this court. *Seaboard Air Line Railway Company v. Watson* (1932) 287 U.S. 86, 77 L.Ed. 180, 53 S.Ct. 32. As will be demonstrated infra, this is at most what petitioner has done. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. This principle excludes from consideration of the court herein a question not presented in or passed upon by a lower court of appeal. *Whitney v. California* (1927) 274 U.S. 357, 362, 363, 71 L.Ed. 1095, 47 S.Ct. 641.

In order to maintain jurisdiction herein, the right, title, privilege or immunity relied upon must not only be specially set up or claimed, but at the proper time and in the proper way. *Mutual Life Insurance Company v. McGrew* (1903) 188 U.S. 291, 308, 47 L.Ed. 480, 23 S.Ct. 375. As stated in *McGrew*, the proper time is in the trial court. Assignment of error is not properly made when made for the first time in a petition for rehearing after judgment or in a petition for writ of error. The assertion of the right must be made unmistakably and not left to mere inference. *Mutual Life Insurance Company v. McGrew, supra*, at pages 308 and 310.

The mere general statement that the decision of the court is violative of petitioner's rights is insufficient. *Clarke v. McDade* (1897) 165 U.S. 168, 41 L.Ed. 673, 17 S.Ct. 284, wherein the court stated:

> "A general statement that the decision of a court is against the constitutional rights of the objecting party or against the Fourteenth Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question even where the judgment is a final one within the section of the Revised Statutes above mentioned. There must be at least some color of a Federal question. [Citation]"

Furthermore it has been held that to review the decision of the state court upon a question of *fact* is not within the jurisdiction of this Court. *Dower v. Richards* (1894) 151 U.S. 658, 663.

Petitioner has set up no federal question in the California Supreme Court nor in the Second District Court of Appeal of California. Additionally, no federal question was decided by the California courts. Furthermore no federal question is set up by the California Supreme Court's mere denial of petitioner's petition for review therein.

Furthermore, petitioner is required by Supreme Court Rule 21 to specify the stage in the proceedings at which the federal questions sought to be reviewed were raised, the method or manner of raising them, *and the way in which they were passed upon by the court.* In other words, petitioner has the burden by Rule 21 of demonstrating that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. It is submitted that petitioner has not done this.

A review of the citations to the record by petitioner as setting up the federal question reveals that the federal question has not been sufficiently placed before the court, and *has not been decided by the court.*

Petitioner's first reference to CT11 and CT9 are merely blanket statements in plaintiff's complaint alleging that plaintiff was denied just compensation in violation of the United States and California Constitutions by means of the design, construction, and maintenance of the channel and of a bridge. The case went to trial only on California tort theories and on inverse condemnation under the California Constitution Article I, Section 19.

Plaintiff's reference to CT1689-1699 merely discusses the California Constitution inverse condemnation provision, Article I, Section 14, now Article I, Section 19. There is no mention of the United States Constitution nor of the Fifth or Fourteenth Amendment.

Petitioner's transcript reference to their opening brief on appeal pages 39 through 46 also refers only to the California Constitution, Article I, Section 19, discussing the policies behind the California inverse condemnation provisions. Again, there is no mention of the United States Constitution nor of the Fifth and Fourteenth Amendments.

Petitioner's reference to its reply brief on appeal pages 2 through 7 also discusses only the California Constitution, Article I, Section 19.

Petitioner's reference to its petition for rehearing pages 1 through 7 again discusses the California Constitution Article I, Section 19 inverse condemnation provision. The only mention of the United States Constitution is a blanket statement that the court's refusal to allow Davis Pacific Corporation its just compensation is in direct violation of the Fifth and Fourteenth Amendments to the Federal Constitution as well as Article I, Section 19 of the California Constitution. That is the only discussion of or reference to the United States Constitution. There is *no argument* concerning the constitution, *no cases* discussing

or supporting said assertion, and there is *no showing of error.*

Lastly, petitioner's reference to its petition for review to the California Supreme Court pages 10 through 26 refers only to California Constitution Article I, Section 19, and contains the same blanket sentence as was contained in the petition for rehearing. Again, *no support or argument* was presented—concerning a possible federal constitutional violation.

Indeed, on reading page 2 of petitioner's petition for review to the California Supreme Court, wherein the issues presented for review are listed, it becomes obvious that no federal question was presented to the California Supreme Court. The issues presented therein are as follows:

> "1. To determine whether this court's constitutional decision in *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 90 Cal.Rtpr. 345, 475 P.2d 441, extends to flood damage resulting from the failure of a public improvement operating as deliberately designed, constructed and maintained (cf. *Belair v. Riverside County Flood Control*, number S001035, now pending);
>
> 2. To determine whether this court's 'reasonable use' doctrine of *Keys v. Romley* (1966) 64 Cal.2d 396, 50 Cal.Rtpr. 273, exonerates a public entity from constitutional condemnation liability based on financial ability; and
>
> 3. To determine whether a public entity has any duty in contract, tort or nuisance to maintain its flood control facilities."

The cases mentioned therein, to wit *Holtz v. Superior Court, supra,* and *Keys v. Romley, supra* do not discuss or decide a federal question nor the United States Constitution. *Holtz* is completely a California Constitution

Article I, § 14 case. *Keys* merely discussed the right of a property owner to discharge surface waters onto another's land, and decided that an upper landowner has a duty of reasonable care in using its property. *It can be seen that no federal question was presented to the California Supreme Court.*

There was no reference to any Federal Constitutional issue in any of the jury instructions given (CT2157-2227, RT2823-2848), nor in the jury instructions not given (CT2228-2295), nor in plaintiff's closing argument to the jury (RT2655-2745, 2791-2804), nor in plaintiff's argument to the court in the inverse condemnation phase (RT2807-2823).

The California inverse condemnation phase was tried before the court. The court made the findings of fact quoted in appendix D to the petition for certiorari (containing the typographical error on page D3 which lists the date of failure of the facility as February 15, 1980, when in fact it was February 16, 1980). As set forth, no discussion of a federal constitutional question was made at that time or in said decision.

The California Court of Appeal issued two unpublished decisions concerning this action, the first having been vacated and superseded by the second decision which is entitled "Opinion on Rehearing," and is attached to petitioner's petition as Appendix B. A perusal of these decisions reveals that *neither decision mentions a federal constitutional question nor rules on one.* They certainly make no holding either expressly or by inference that the 5th and 14th Amendments to the United States Constitution have a financial exemption. The only issues in said decision concern causes of action arising out of State tort law and inverse condemnation under the California Constitution.

As set forth *supra*, a federal question is not brought up by merely mentioning it. However, even if it could be, since there is no direct civil action for damages against a defendant for violation of its Fifth and Fourteenth Amendment rights, and there is no civil rights cause of action set up or decided, a mention of the federal constitution is insufficient on those grounds as well.

This is a civil action. Petitioner is not challenging a statute as unconstitutional, nor is petitioner discussing a constitutional violation in a criminal trial. And, as set forth, there is no direct civil action for damages as against defendant herein for violation of Fifth and Fourteenth Amendment rights.

Plaintiff's forum as to the U.S. Constitution, if it exists at all, is under 42 U.S.C. § 1983. The only direct use of the Constitutional Amendments generally involves situations where certain improperly obtained evidence is suppressed, or in the enjoining of an unconstitutional State statute.

While *Bivens v. Six Unknown Named Federal Narcotics Agents* (1971) 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999, provided for a direct action as against the Federal Government and its employees for violation of that plaintiff's constitutional rights, *there is no Bivens action against a municipality or its employees. Kostka v. Hogg* (1st Cir. 1977) 560 F.2d 37, 42. *Bivens* provided a direct action as against the Federal government and Federal employees because a 42 U.S.C. § 1983 action did not apply to the Federal government and Federal employees. However, since a 42 U.S.C. § 1983 action is theoretically available against these moving defendants, a direct *Bivens* action cannot be justified. Section 1983, not *Bivens*, is the appropriate vehicle for redressing Constitutional claims against a local public entity. *Graves v. Wayne County* (D.C. Mich. 1984) 577 F.Supp. 1008, 1013, interpreting *Carlson v. Green* (1980) 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468.

If petitioner is permitted to bypass the pleading and proof requirements of 42 U.S.C. § 1983 by bringing a direct action against respondent herein, especially when neither the trial nor the State appeals concerned the Federal Constitution, section 1983 would be effectively emasculated.

Furthermore, technically, and by petitioner's own words, petitioner is requesting certiorari only to review the decision of the California Supreme Court filed April 6, 1988. All that decision is is a denial of petition for review. Such a decision is not itself reviewable.

Article VI § 12 of the California Constitution provides as follows:

> "(b) The Supreme Court *may* review the decision of a court of appeal in any cause."

Said discretionary decision is of course not itself reviewable and cannot violate a right of petitioner herein under the Federal Constitution.

In short, it is an insult to this Supreme Court and to the United States Constitution to construe a California Appellate decision based only on the California Constitution and California tort law to apply to the United States Constitution without any discussion of the United States Constitutional Amendments violated, how they were violated, duties created thereunder, standards of review, and the like. As presented by petitioner, this is a California inverse condemnation case pure and simple. Furthermore, the factual decision of the trial court below is not reviewable herein.

STATEMENT OF THE CASE

This action involves flooding which occurred when the Calleguas Creek Channel breached, causing damage to plaintiff's property.

Historically, the area of which plaintiff's property is a part has been marshland, and generally a flood plain (RT1920-1921; defendant's Exhibits 1, 8, 33, 53). In fact, defendant's Exhibit 33, a 1919 topographic map of the area, specifically labels the area "flood land." A long-time farmer in the area also testified that the area was designated as flood land (RT395, 404). The area has had a history of drainage problems (RT1967). The Calleguas Creek Watershed was described by plaintiff in his opening statement as the area comprising the Simi Valley, Conejo Valley, and Santa Rosa Valley, which drain into Calleguas Creek.

In the 1930's, in order to protect their own property, the various landowners began constructing levees made of sand. After a time, natural patterns of deposition raised the bottom of the channel above the elevation of the neighboring farmland. These farmers' levees did not eliminate flooding (RT413, 2336, 2400, 2403). The landowners remained worried that these levees would give out and that their lands would once again be flooded (RT439,2464,2429,2430).

In 1960, the project which is the subject of this action was created. This project was an enhancement of the farmers' levees. The Simi Valley Soil Conservation District and the Calleguas Conservation District were local sponsors to the project (RT1121). These Districts, which were by their agreement with the Federal Soil Conservation Service (SCS) to be responsible for maintenance of the project once it was built, entered into an agreement with the Ventura County Flood Control District (FCD) whereby the FCD would be responsible for maintaining the project once it was completed (RT1121-1122). There was no direct agreement between the FCD and the SCS. The FCD was not involved in the design, construction, nor inspection phase of the

project. While certain FCD employees attended a few meetings, its involvement was quite limited (RT465-466).

It is undisputed that the Soil Conservation Service of the U.S. Department of Agriculture (SCS) was responsible for the design, construction, and inspection of the project. The design and construction of the project was accomplished by the Wilsey & Hamm Engineering Firm, which was hired by the Federal SCS. In general, the project involved cutting some areas of the old farmers' levees, filling others, adding rock rip-rap on the inside of the channel to a depth of three feet below the channel bottom, and clearing the extensive vegetation which was in the channel bottom. The rip-rap was designed to extend below the channel bottom because at high flows, the sandy bottom becomes liquid and travels (RT634, 2447).

The enhanced channel was designed to carry and withstand a flow of 15,000 cubic feet per second (cfs) (RT963, 1182, 2259). *There is no evidence whatsoever that the channel was designed nor contemplated to withstand a flow of greater than 15,000 cfs* (RT1184, 2270, 2501). It was certainly not expected that the channel would hold 25,000 cfs (RT1184, 1185, 1219, 2447). Contrary to petitioner's suggestion, *the project greatly helped the situation* (RT1189, 1957, 2430).

There was testimony at the Trial that there had been a flow in the Calleguas Channel in 1969 of 16,300 cfs, and in 1978 of 18,700 cfs, and yet the channel, which was designed only for 15,000 cfs, held (RT811, 819, 882, 2478, 2716). During the twenty years between the construction of the project and the incident which is the subject of this action, extensive maintenance activity was undertaken by the FCD and *no evidence of negligent maintenance was presented.* This maintenance included bringing rock in to create a usable roadway on the top of the levee, maintaining that road, cleaning out the channel of debris and sedimentation,

rodent control, and the like. (RT437, 843-846, 871, 940, 943, 944, 2085, 2088, 2089, 2090, 2105).

On February 16, 1980, the west levee broke on the outside of a curve at Station 148 of the channel at a flow of approximately 25,190 cfs (RT1429, 2477, 2658). *This quantity of flow greatly exceeded the design capacity of the channel.*

In 1979, a survey had revealed that the elevation of the road running along the top of the levee was approximately two feet below the elevation shown in the design plans. The design had called for rock rip-rap on the inside of the channel to a certain height, and then two feet of sandy material on top of the rip-rap. During the 1979 survey, the rip-rap height was correct, but the level of the road was even with the top of the rip-rap.

One of the major factual issues around which this action revolved is whether in fact the project was constructed without the extra two feet of sand, or whether negligent maintenance caused the levee to lower two feet in elevation from its original design.

Extensive evidence was presented that the levee was in fact *not built to design height*, but that the design *rip-rap* elevation was taken to be the critical elevation, and *the extra two feet of sand was never placed on top of the rip-rap* (defendant's Exhibits 6 and 7, and RT621, 634, 821-822, 863, 864, 1158, 1433, 2084). *Defendants Exhibits 6 and 7 were photographs taken at the time of construction, from road level, and demonstrate clearly that the level of rip-rap was even with the road on the top of the levee.* There is no indication that two extra feet of sand was *ever* placed above this. There was testimony that, in 1964, the rip-rap was even with the road surface (RT621, 2084). The final survey records were never found (RT1150, 1191). In fact, Ronald Calhoun, the Vice President of Wilsey & Hamm, was

puzzled as to the purpose of the two extra feet, and was of the opinion that two extra feet of exposed sand above the rip-rap would erode at higher flows and thus would be fairly useless (RT2268, 2270, 2284).

In order to obtain the result that, in 1980 (and in fact as early as 1964), the rip-rap was even with the service road, three possibilities exist. The first is that the project was built as it existed in 1980, *i.e.*, the rip-rap at the proper height, and without the useless two extra feet of sand. The second is that the project was created with the rip-rap to the proper elevation, the two feet of sand above that, and then the two feet of sand inexplicably eroded or subsided uniformly two feet over the entire length of the levee system. The third alternative is that the contractor made a gift of two extra feet of rip-rap (at a time when both sand and rock were scarce) covering where the exposed sand should have been and then the entire two feet either eroded or subsided, again over the entire length of the project. There is no evidence whatsoever that the latter two alternatives occurred, and there is extensive evidence that the levees were not built to design specifications in the first place.

In any event, petitioner's theory seemed to be based on the claim that the levees were built to specification by SCS, that the two extra feet of sand disappeared as a result of negligent maintenance on the part of the Ventura County FCD, and that this two extra feet of sand would have prevented the breach. Petitioner's theory before the California Supreme Court seemed to be that the project was built (by the Federal Government), and that the Ventura County Flood Control District should automatically pay for plaintiff's damages. Petitioner attempted to hold the Ventura County Flood Control District responsible on theories of negligence, inverse condemnation, nuisance, and breach of contract.

Petitioner's theory now seems to be that the damage to its property is violative of the Fifth and Fourteenth Amendments to the United States Constitution and that therefore the Ventura County Flood Control District should automatically pay for said damages regardless of the fact that it did not construct the improvement and was held by the California Courts to have performed its maintenance duty (its only duty) admirably and completely.

Two theories concerning the mechanism of breakout of the levee were set forth at Trial. Petitioner's theory was based on the mechanism of overtopping (overflow) of the levee. However, no convincing testimony was elicited concerning this theory, since it was based on a greatly over-simplified computer model (HEC II) and incorrect values for certain variables in the computer modeling program (RT1311, 1318, 1320, 1321, 1377, 1315, 1355-1357, 1361, 1378, 1383, 1454-1456, 2181-2183, 2474-2475, 2529). The HEC II program assumes that the bottom and sides of the channel are solid (when in fact the Calleguas channel is a soft-bottom channel), does not deal with a sediment carrying channel (which this channel is), does not accurately depict the change in the channel cross-sections, nor does it account for scour on the outside of a curve nor for change in the roughness of the channel as bed forms change, nor can it handle the bend in the channel, nor does it consider possible failure of rip-rap or undermining or tractive forces pulling at the rip-rap, nor does it take turbulence into account, nor does it take centrifugal force around a curve into account (RT532-536, 1315, 1355-1357, 1361, 1378, 1454, 1455-1456, 2181-2183, 2474-2475, 2529).

The FCD's theory with regard to the mechanism of the breakout was amply supported by the evidence. That theory was that, because of the fact that the rip-rap extended only three feet below the soft bed of the channel, which was a depth which was agreed to be insufficient to hold a flow of

25,000 cfs (RT1345, 639-640, 2447), the forces were such that the rock rip-rap was undermined and slumped into the channel, causing the breakout (RT2169-2170, 2448-2450). The flow regime which occurred in the channel at the time of the breakout was the standing wave phenomenon (RT2131-2132, 2136, 1060-1062, 2113, 2119). In addition, great turbulence occurs on the outside of a curve, providing scour, where the bed of the channel at and under the rip-rap are eaten away. Convincing evidence that this scour occurred at the location of the breakout was presented at the Trial (RT1741-1744-1745, 2047-2048). Based on eyewitness testimony, the unrefuted evidence of the depth of scour, and on complex mathematical formulations which were far more accurate than the HEC II model used by plaintiff's experts, the defense experts were of the opinion that undermining, not overtopping, was the mechanism of the breakout in the instant action (RT293, 305, 307, 528, 682-683, 1060-1062, 1185, 1219, 1741, 1744-1745, 2047-2048, 2113, 2119, 2115, 2116, 2118, 2135, 2136, 2142, 2145-2147, 2169-2170, 2171-2172, 2179, 2183-2185, 2232-3233, 2235, 2443, 2448, 2450, 2456, 2478, 2510, 2514, 2563, 2577, 2581, 2595).

The evidence was overwhelming that the failure resulted from the fact that the rip-rap was originally placed only to a depth of three feet below the dry channel bottom, in order to maintain a flow of 15,000 cfs, and that the liquification of the bottom of the channel resulting from the flow, along with the turbulence and scour conditions existing in flow regimes above 15,000 cfs, undermined the rip-rap, causing the levee to fail. When it is understood that this is the most credible and probable mechanism of the breakout, the discrepancy in the height of the levee, to wit the two extra feet of sand, becomes irrelevant.

The plaintiff's complaint as against the FCD sought recovery on theories of diversion of waters from a natural

watercourse; negligent design, construction, and maintenance of the channel; nuisance; inverse condemnation; and breach of contract. The issues which were determined at Trial concerned inverse condemnation (*under the California Constitution only*) with respect to the maintenance of the channel, dangerous condition of public property, and breach of contract. Petitioner's theory, essentially, was that the levee was built to specification, and that the FCD is responsible for permitting the levee to subside two feet, thereby causing the breach of the channel. Petitioner makes the further claim that, since the project was built and failed, that the FCD should automatically be liable and that the proximate causal connection *with the FCD* is unnecessary.

The FCD presented a Motion in Limine to exclude evidence of upstream development in any manner that would demonstrate a duty on the part of the FCD to increase the capacity of the channel (CT1854-1872). The ruling on this Motion in Limine was for the most part the subject of plaintiff's appeal. However petitioner seems to have abandoned this issue insofar as California and U. S. Supreme Court review is concerned.

The Trial Court recognized that the FCD had no obligation to increase the capacity of the channel, merely *to maintain it as built*. Appellant's citations in its briefs to the ruling on this issue referred only to the motions themselves and generally to 100 pages of argument. In actuality, the ruling was that evidence of upstream development would not be permitted as it was directly contrary to the law as it presently stood (and still stands), and since it would tend to place on the FCD an obligation that it could not necessarily fulfill because there was no responsibility for upstream development nor funding therefor (RT96-97). The Court opined that the evidence required to deal with the issues of upstream development would take an inordinate amount of

time (RT96) and would place an extra burden on the FCD which was not placed upon it by law (RT100, 101).

Although counsel for plaintiff stated to the Court that *it was not contending that the FCD had a duty to change the design of the channel or levees*, but merely the duty to maintain them as originally designed and built (RT92, 93, 1099), the Court stated that it made its ruling because it did not wish to imply to the jury that the FCD had any duty to take care of the additional runoff which would be the result of the extensive upstream development which occurred.

After being requested to reconsider its ruling, and after considering the further papers and argument proffered by plaintiff, the Court then ruled that the FCD was not obligated under any theory to improve or increase the facility because of upstream development or use (RT190). However, *the Court did permit evidence of this increased flow* (RT190, 811, 819, 882, 2478, 2716). The Court, too, remarked to plaintiff that it was still able to show negligence without the need of evidence of upstream development (RT194). In fact, plaintiff several times mentioned the extent of the watershed and the increased flows (RT145-153, 811, 819, 882, 2478, 2716, 224, 227).

A damages instruction was given to the effect that the jury was authorized to offset the benefit of the existence of the Calleguas Creek facility as built by the Federal Soil Conservation Service on plaintiff's property with the reasonable damage the jury might find that plaintiff had suffered (RT2838). However, whether or not such an instruction is error is irrelevant since judgment was not for plaintiff with zero damages, but was rather a complete defense verdict. Furthermore, the jury should not get to the application of the special benefits offset because there has been no breach of any duty in the first place.

Away from the jury, the Court held its hearing on the liability phase of the California Constitution inverse condemnation case, and made its *factual finding* in favor of defendant. The jury later returned with a verdict in favor of the defendant by a 10 to 2 vote. Plaintiff's Motion for New Trial was denied.

Plaintiff appealed from said verdict. The California Appellate Court upheld the Trial Court's judgment denying liability on the California inverse condemnation theory, and further upheld the propriety of the Trial Court's ruling precluding the introduction of evidence of upstream development. The Appellate Court's original decision reversed and remanded the dangerous condition and breach of contract causes of action because of the perceived inapplicability of the discretionary immunity to dangerous condition liability and because of the perceived inappropriateness of the special benefits offset to damages. Both parties petitioned for rehearing. Rehearing was granted.

In its opinion on rehearing, the Court of Appeal reinstated the entire defense verdict, agreeing that *the FCD performed no deliberate act which caused damage to plaintiff's property*, that there was *no cause and effect relationship* between the FCD and the damage to plaintiff's property, that the land flooded *despite* the levees, and that it was unnecessary to discuss the instructional errors (concerning the discretionary immunity instruction and the special benefits offset) since appellant failed to establish a duty which the FCD breached.

By its original appeal, petitioner set out numerous issues on appeal (none of them federal questions). The reality of the matter was that petitioner wanted to change the law and place upon the FCD the duty to upgrade and increase the facility (which the FCD did not even build) to handle increased runoff resulting from upstream development.

Petitioner now admits that there is no constitutional obligation to upgrade the existing levee facility (petition for certiorari page 12). Indeed petitioner abandoned in its petition for review before the California Supreme Court, and thus has conceded, most of the issues in its original appeal.

SUMMARY OF ARGUMENT

In summary, it is respondent's position that no federal question has been presented for review. Petitioner's arguments concern only a California Constitutional provision for inverse condemnation and general language about the fact that takings in the abstract do on occasion occur.

It is the position of this responding party that the trial court's finding of fact on the issues of inverse condemnation are correct. It is further submitted that the Ventura County Flood Control District has no duty to upgrade the facility, that the Flood Control District is not an insurer of complete safety from flood damage, and that there is no constitutional requirement for perfection in flood control.

ARGUMENT

I

STANDARD OF REVIEW BY CALIFORNIA COURTS OF APPEAL

The Appellate Court presumes that the judgment or order appealed from was correctly decided by the Trial Court. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65. Unless the record affirmatively demonstrates the error, the Appellate Court will presume that the

evidence and findings support the judgment and that the Trial Court based its decision on appropriate findings and disregarded incorrect or insufficient ones. *Kompf v. Morrison* (1946) 73 Cal.App.2d 284, 166 P.2d 350; *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583, 2 Cal.Rptr. 609. Appellant has the burden of proving error. *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226, 74 Cal.Rptr. 749.

If the lower court decision was correct on any legal ground, it should be affirmed whether or not the reasons cited are wrong. *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 15 Cal.Rptr. 119; *Stone v. Los Angeles County Flood Control District* (1947) 81 Cal.App.2d 902, 907, 185 P.2d 396.

The Trial Court has the discretion to exclude evidence if it determines that the probative value of the evidence is substantially outweighed by the probability that its admission will either necessitate undue consumption of time, or create the substantial danger of undue prejudice, confusion of the issues, or misleading the jury. Evidence Code § 352. Upon review of such a discretionary ruling, the Trial Court's decision will not be reversed on Appeal unless there is manifest abuse of that discretion resulting in a miscarriage of justice, *People v. Wein* (1977) 69 Cal.App.3d 79, 137 Cal.Rptr. 814; *Baker v. Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 157 Cal.Rptr. 779. The Appellate Court may not substitute its judgment for that of the Trial Court. *Cain v. State Farm Mutual Automobile Insurance Co.* (1975) 47 Cal.App.3d 783, 121 Cal.Rptr. 200.

With respect to the California inverse condemnation cause of action, it should be noted that said cause of action was tried before the Court, and *the Court was the finder of fact thereon.* Trial Court findings of fact will be upset on Appeal only when there is *no substantial evidence* to support them. *Marriage of Mix* (1975) 14 Cal.3d 604, 614,

122 Cal.Rptr. 79; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64, 107 Cal.Rtpr. 45.

In applying the substantial evidence test, the reviewing Court must review the evidence in the light most favorable to respondent. *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 101 Cal.Rptr. 568. It should accept respondent's evidence as true, resolve all conflicts in the evidence in respondent's favor, and draw all favorable inferences that may reasonably be drawn. *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, 138 Cal.Rptr.705.

In its statement of decision (CT2370-2374), which found in favor of defendant on the inverse condemnation causes of action, the trial court recognized that plaintiff's land was on a natural flood plain formed by alluvial deposits, that prior to the construction of the man-made structures storm waters spread over plaintiff's land, that prior to the U.S. Soil Conservation Service (SCS) improvement, the farmer's levees were subject to erosion and breakout, that the United States SCS under the local sponsorship of the Calleguas and Simi Soil Conservation Districts designed and constructed the levee improvements which are the subject of this action, that *the project was designed to hold 15,000 cubic feet per second (cfs) of water, that on the date of the flood which is the subject of this action the facility was capable of holding said 15,000 cfs, that the facility failed at 25,190 cfs,* that the facility failed by scour and/or tractive forces exceeding the design limitations of the levees as engineered and constructed by SCS resulting in undermining (though the court noted that the mechanism of the failure was irrelevant), that the service roads above the rock rip-rap were not installed by SCS to design height, that *the FCD reasonably maintained the SCS facility in the condition in which it was turned over to the FCD, and that plaintiff's damage did not occur because of the design or any faulty maintenance of the facility by the FCD.*

In its statement of decision, the trial court also correctly noted that the FCD was under no duty to construct the flood control system nor was it under any duty to provide an indestructible facility, that the FCD's only duty was to reasonably maintain the flood control improvement which had been turned over by SCS *as contructed*, that the FCD provided proper and adequate maintenance to maintain the integrity of the improvement, that the flood control system reduced the natural flooding of plaintiff's property, that the storm flow exceeded the carrying capacity of the improved channel (proximately causing the breach of the levee and the damage to plaintiff), that the FCD had no duty to provide plaintiff with a channel with increased capacity nor any obligation to improve the capacity of the channel to meet changing conditions attributable to upstream urbanization, and that therefore there was no basis for California inverse condemnation liability as against the FCD. The California Appellate Court agreed.

II

THE TRIAL COURT'S RULING ON THE INVERSE CONDEMNATION CAUSE OF ACTION WAS PROPER

Petitioner makes the claim that liability should be imposed as against the FCD automatically on the grounds that the injury was caused by an improvement as maintained by the FCD.

It is not the rule that a project built by *anyone* which *improves* a situation to an extent not satisfactory to a particular landowner subjects the entity which agrees to maintain the project to liability. *U.S. v. Sponenbarger* (1939) 308 U.S. 256, and *Weck v. Los Angeles County Flood Control District* (1947) 80 Cal.App.2d 182, 181 P.2d 935.

The FCD is not an insurer against all possible damage that might be inflicted on private property. *Stone, supra; House v. Los Angeles County Flood Control District* (1944) 25 Cal.2d 384, 392, *Tri-Chem, Inc. v. Los Angeles County Flood Control District* (1976) 60 Cal.App.3d 306, 132 Cal.Rptr. 142.

Extensive evidence was produced, and the trial court found, that *the project which failed was not the FCD's project.* The project was indisputably designed and built by the Soil Conservation Service of the U.S. Department of Agriculture (SCS). The FCD involvement in the process was not remotely sufficient to compel liability on its part for damage when the project functioned as designed but not quite well enough to suit plaintiff's liking.

Interestingly, petitioner makes the completely unsupported claim that it is undisputed that the FCD approved, accepted, and agreed to exclusively maintain the facility. No evidence has been set forth to support such an assertion, and in fact *the trial court found to the contrary.* While acceptance of a project can be sufficient for liability, the attributes of sufficient acceptance are not present in the instant action. In the cases holding acceptance to be sufficient, far greater involvement then that which exists in the instant case is found. *See,* for instance, *Heimann v. City of Los Angeles* (1947) 30 Cal.2d 746, 185 P.2d 597 (entity furnished plans and performed the design of the project); and *Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, 734-735, 84 Cal.Rptr. 11 and *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 362-363, 28 Cal.Rptr. 357 (entity involved in actual requirements for planning and construction, furnished specific plans and specifications, substantially participated in the project).

The flooding which occurred in the instant action occurred *in spite of, not because of,* the FCD's activities. As set forth in *U.S. v. Sponenbarger, supra,* major floods may

sometimes overrun a river's banks *despite, not because of*, the government's best efforts, and in that case the government has not taken the plaintiff's property. The court stated:

> ". . . and the Fifth Amendment does not make the government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all."

The duty of the FCD in this instance, when it has agreed to maintain a flood control facility built by the U.S. Soil Conservation Service is limited to not making matters worse. *Tri-Chem, supra, U.S. v. Sponenbarger, supra,* and *Janssen v. County of Los Angeles* (1942) 50 Cal.App.2d 45, 56-57. As set forth, there is no duty on the part of the FCD to build a flood control facility. *Tri-Chem, supra; Weck, supra; Shaeffer v. State of California* (1972) 22 Cal.App.3d 1017, 99 Cal.Rptr. 861; *U.S. v. Sponenbarger, supra.* There is also no duty to make a flood control facility impervious. *Stone, supra*; and *Janssen, supra* (otherwise there would be slight if any incentive for an entity to extend its aid at all). The California *Water Code Appendix* section which creates the Ventura County Flood Control District sets forth no mandatory duties upon the Flood Control District to contradict this well settled tenet of law.

To hold otherwise would create duties on the part of a flood control district which it could not afford to carry out. Major cleanout projects of the channel are already funded by the Federal government (CR632). The FCD has no power to increase the capacity of the channel (RT840, 870-871), nor does it have the funds (RT1009-1011, 1261-1263). In fact, the enabling legislation for the FCD itself provides specific funding limitations. *Water Code Appendix* §§ 46-12 and 46-12.2. The powers of the FCD to levy taxes and fees are limited by the terms of sections 46-12 and 46-12.2.

It is not, nor should it be, the law to require an entity which merely *agreed to maintain* a flood control facility which was built by the Federal government to increase the facility to take care of any additional runoff which may occur. The Trial Court herein correctly realized that it could not permit evidence of upstream development without implying that such a duty existed (RT178-179).

Since the FCD had only the duty to maintain the facility as constructed, at 15,000 cfs, and no duty to improve it, and since the flooding of plaintiff's property occurred *in spite of* rather than because of the facility or the FCD's maintenance of said facility, no inverse condemnation liability can attach.

Petitioner has made the claim that under the court's findings, it is entitled to judgment. Yet the Trial Court's decision recognized that plaintiff's land would have been flooded even without the improvement at all, that the FCD's maintenance was adequate and appropriate, that the facility as maintained was capable of retaining 15,000 cfs, that the facility failed at 25,190 cfs, and that the storm flow exceeded the carrying capacity of the improved channel, proximately causing the breach of the levee and the damage to plaintiff.

Petitioner for some reason feels that there is no need for the causation link. However, as the California appellate court amply noted in its decision, the question is indeed causation (original decision pages 30 and 33, decision on rehearing pages 22-26). As noted in the decision, the trial court found that the FCD adequately and reasonably maintained the channel and neither the maintenance nor any purported two foot difference between design height and height as constructed caused Davis Pacific's damage. *The channel was simply not designed to accept 25,000 cfs of water flow.*

This is not a situation where a defendant removed a portion of the facility or deliberately adopted a maintenance plan which the FCD knew was inadequate. The FCD's maintenance would rise to the level of construction only if it deliberately changed or altered the improvement as constructed or failed to replace or repair the improvement as constructed and its action caused the plaintiff's damage.

This trial court expressly found *no* negligence in the operation and maintenance of the facility on the part of the FCD. *The FCD's "project" (maintenance of the facility as built to a capacity of 15,000 cfs) did not fail.* As already set forth, the FCD is not an insurer against all possible damage that might be inflicted on private property. There is no taking if a facility makes a situation partially better, rather than totally better. *U.S. v. Sponenbarger, supra.* A design that was expected to fail once every fifty years is far better than a design which would fail every time it rained, which is what would occur without the levees. In other words, the SCS did not inflict upon plaintiff a project with a greater risk than plaintiff already had. The project was curative, not causative. No one can seriously contend that the rip-rapped levees were worse than no levees at all (which would permit waters to spread everywhere), nor that the project was worse than unreinforced and unmaintained sand levees which failed regularly, and which had no protection against erosion.

Since substantial evidence supported the trial court's conclusion in the form of its ruling in favor of the FCD on the inverse condemnation action, the appellate court's decision correctly affirmed said decision.

Lastly, the cases cited by petitioner do not provide authority for the relief petitioner requests.

The decision in *Pennsylvania Coal Company v. Mahon* (1922) 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158, concerned

the construction of a statute and whether said statute was sustainable under the police power. The *Pennsylvania Coal* decision merely stated that that particular statute went too far. This decision has nothing to do with the instant action.

Petitioner cites *Armstrong v. United States* (1960) 364 U.S. 40, 4 L.Ed.2d 1554, 80 S.Ct. 1563. However, *Armstrong*, like *Pennsylvania Coal*, merely contained general language that the Fifth Amendment to the United States Constitution bars takings. This general language has no bearing in the instant action, as the Fifth Amendment applies only to the Federal Government, and, more importantly, no taking has been shown herein.

Petitioner also cites this court to the *United States v. Willow River Company* (1945) 324 U.S. 499, 502, 89 L.Ed. 1101, 65 S.Ct. 761 for general language concerning when an individual is asked to assume more than its fair share of a public burden. *Willow River* had to do with a situation concerning riparian rights. The court of claims awarded $25,000.00 compensation for the impaired efficiency of a hydroelectric plant caused by the United States raising the water level of the river. The court in the *Willow River* case held that this did *not* constitute a taking requiring compensation. The *Willow River* court made a remark which is quite relevant to the instant action, stating:

> "[The Fifth Amendment] does not undertake, however, to socialize all losses, but those only which result from a taking of property."

Similarly, in the instant action, the mere suffering of a loss by petitioner herein does not compel the conclusion that said loss is to be socialized or is a taking entitling it to compensation.

Similarly, the case of *Monongahela Navigation Company v. United States* (1892) 148 U.S. 312, 37 L.Ed. 463, 13 S.Ct. 622 cited by petitioner makes the same holding as the

Willow River case, merely reciting general language concerning takings and compensation therefor. And *First Lutheran Church v. L.A. County* (1987) 107 S.Ct. 2378 was a regulatory taking case having nothing to do with the issues herein.

Petitioner also cites the case of *Lea Company v. North Carolina Board of Transportation* (1983) 304 S.E.2d 164, a North Carolina State Supreme Court decision, for the proposition that a 100-year flood is forseeable and the basis for inverse condemnation *under North Carolina Law*. This holding has no bearing on the instant case. In the instant action, the flood control district was not responsible for the improvement, and is not an insurer that the evil of floods be stamped out universally before it is attacked at all. *U.S. v. Sponenbarger, supra*. Additionally, the *Lea* case concerned the flooding caused by construction of a highway. The court therein construed the constitution of the State of North Carolina. The *Lea* court *upheld the trial court's finding* of fact that a 100-year flood was forseeable at the time of construction *of the highway*, noting that later activity could not be considered in terms of inverse condemnation. *Lea, supra* at page 174. The *Lea* court stated:

> "To require the State to anticipate the shifting of business and population centers and the attendant acts or construction by others contemporaneous or subsequent to the State's construction, and to hold the State liable for taking if it fails to do so, would place an unreasonable and unjust burden upon public funds. No such result is required by the Constitution of the United States or the Constitution of North Carolina."

Similarly, in the instant action, petitioners are complaining that upstream urbanization increased the water in the channel thus causing the channel failure. The Flood

Control District cannot be required to anticipate same, and the increased urbanization upstream does not create the duty on the part of the Flood Control District to upgrade a facility which it has only agreed to maintain as built.

Furthermore, even if a 100-year flood is foreseeable in the instant case, the FCD has no duty to prevent damage caused by a 100-year flood (*U.S. v. Sponenbarger, supra*), and petitioner's land would be damaged if the facility did not exist. This is in direct contrast to the *Lea* case, where the highway construction *caused* flooding which would not otherwise occur.

Plaintiff's citations to *U.S v. Lynah* (1903) 188 U.S. 445, 47 L.Ed. 539, 23 S.Ct. 349, and *United States v. Williams* (1903) 188 U.S. 485, 47 L.Ed. 554, 23 S.Ct. 363, are unpersuasive. Those cases involved the U.S.'s building of a dam obstructing a river and causing plaintiff's land to be permanently under 18 inches of water, causing *total* destruction in the value of the land. That activity was held to be a taking under the Fifth Amendment. Those cases merely stand for the proposition that when the United States Government takes land by means of the equivalent of emiment domain for public purposes, it must pay compensation. No such taking has occurred in the instant action.

The only case cited by petitioner for any proposition other than general tenets of law is *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 194 Cal.Rptr. 582. However, *McMahan's nowhere mentions the United States Constitution and is purely a California Constitution case,* and makes no holding concerning the United States Constitution. Also, in *McMahan's,* the defendant itself installed the watermains which later failed. In the instant action, the Flood Control District did not build the facility, but merely agreed to and did maintain it as built. Furthermore, in *McMahan's,* the

defendant had a maintenance program *known* to be inadequate. In the instant action, the maintenance was accomplished maintaining the facility as built, and indeed the facility in the instant action several times held far more than its design capacity.

It is submitted that this trial court's decision on inverse condemnation was correct, and that no duty to upgrade the facility nor to anticipate upstream development exists.

CONCLUSION

In sum, it is urged first that this court has no jurisdiction to grant certiorari in the instant action as no federal question is presented herein, nor has a federal question been presented nor ruled upon below.

Furthermore it is urged that the trial court's decision was correct on the California inverse condemnation issue, and that causation is a very real part of inverse condemnation liability. The mere fact that a facility fails is not sufficient in and of itself to support inverse condemnation liability. The flooding in this action occurred *despite not because of* the facility and the Flood Control District's activities.

Furthermore, it is asserted that no duty upgrade the facility, and in fact no ability to do so, exists. The only duty on the part of the FCD was to maintain the facility as built, and the Trial Court and the Appellate Courts correctly found that said duty was satisfied. The Flood Control District is not and should not be held to be an insurer that the evil of floods be stamped out universally before the evil can be attacked at all.

It is respectfully submitted that certiorari should be denied.

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Respectfully submitted,

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